INDEX

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUBJECT INDEX

	Pages
I. Summary and Statement of Matter Involved	1-4
II. Reasons Relied On for the Allowance of the Writ	4-8
(Nine grounds are specified.) The instant decision is in direct conflict with a decision of this Court. Both decisions construed Section 70 of the Water Code of 1909, this Court holding it did not destroy vested rights. The instant opinion held that it did destroy vested rights	5-8
Citing, Judicial Code, § 128, and cases	4, 5
III. Prayer	8-10
I. Brief in Support of Petition for Certiorari	18-32
(a) Statutory Provision to Sustain Jurisdiction, Judicial Code § 24 Amd. (28 U. S. C. A. Sec. 41)	12
(b) Date of Decree in District Court, March 11, 1932. (R. 79)	12
(c) Date of Opinion in Appellate Court, Nov. 5, 1934. (R. 478). (Dissenting Opinion R. 452). (Not yet reported)	12
(d) Date of Decree of Appellate Court, with transcript reference, Nov. 5, 1934. (R. 480)	12
II. Jurisdiction (Sec. 240 Judicial Code, 28 U. S. C. A. Sec. 347	12, 17, 18

Pages

III. Statement of Facts 12-15

IV. Specification of Errors 15-17

Statutes and Cases believed to sustain jurisdiction, under Subdivision III, "Jurisdiction" 17-18

V. Argument 18-32

Summary 18-19

On Oregon's admission to statehood it adopted the common law riparian doctrine, which was the doctrine of continuous flow; and that the river bed and the stream were common for the use of riparian proprietors on each side of the stream. The 1909 Act, as construed in the instant case, destroyed petitioner's vested riparian right which passed to the patentee in 1886, and continued in the land owner. Appellant purchased said lands with said rights in 1921. The construction in the instant decision that the rights were destroyed by the Water Code conflicts with the decision of this Court in Pacific Livestock v. Lewis, and violates the State Court's construction of Section 4 of Article XI of the Oregon Constitution. The instant opinion puts its decision upon the exercise of police power, but instead of a regulation, it is a taking without compensation 18-19

The Common Law Riparian Doctrine 19-23

Here we show that both the State Court and this Court recognize that Oregon adopted and maintained the common law riparian doctrine until the decision of the Hood River case in 1914. Numerous cases are cited from both courts 19-23

Legislative Recognition of Common Law Riparian Rights 23

Pages

Under this title we refer to the Appendix LIV to LIX wherein are quoted such Oregon Legislative Acts of 1891, 1895, 1899, 1903 (amending 1899), 1901 and 1905. Most of these allow condemnation of rights of riparian proprietors "arising from their *location*"... 23

The Decision of the Appellate Court Violates Section 4 of Article XI of the Oregon Constitution; The "Due Process of Laws" Clause and the "Equal Protection of the Laws" Clause of the 14th Amendment of the Federal Constitution, and Conflicts with the Decision of This Court 23-26

In addition to what has been said, we here point out that, as construed, the Water Code took petitioner's vested right without either due process of law or compensation. It violated the "Equal Protection of the Laws" clause in discriminating against those of whom the petitioner is one, who had not used its riparian right prior to the enactment of the Water Code, and in favor of those who had used such right. It also discriminated by permitting strangers to the stream to appropriate the waters secured by the said vested rights aforesaid 23-26

The River Bed 26-27

The Federal Act of May 18, 1796, still in force, provides that where opposite banks of non-navigable streams belong to different persons (as here) both stream and bed of stream become common to both. Each has rights to use both water and river bed 26-27

Statute copied 27

Pages

The Remedy, "Injunctive Relief" to preserve river bed 27-28

We quote the Oregon Court to show that equity will not only enjoin the destruction of the river bed on the application of the owner of the banks on the opposite side of the stream, but will compel him to restore the bed to its former condition, sufficient to keep the stream in its channel 27-28

Respondents' Permits 28

These are nothing but licenses to appropriate water subject to existing rights, such as petitioner's riparian rights. This Court is quoted to the effect that the permits are not in law adjudications, but mere licenses to appropriate, which may never amount to appropriations 28

Police Power 28-31

We quote the Oregon Constitutional Referendum Amendment, as construed by the State Court, and show clearly that emergency clauses were used to prevent Legislative Acts from being referred to the people. They do not indicate the exercise of police power in the sense in which it is used in the instant opinion. We commend consideration of the Kadderly case as set out in the Appendix 29

We here show the errors made in the decision below in construing the taking *in toto* of petitioner's vested right for the benefit of another without compensation. It amounts to taking the property from one and giving it to another under the pretense of public good. Instant

Pages

opinion conflicts with decision of this court in Pacific Livestock Case 29, 30, 31

The Desert Land Act 31

This Federal Act of May 3rd, 1877, was for settlement of unsettled arid sections. In Hough v. Porter, 1909, the Oregon Court construed it as destroying riparian rights in government lands patented subsequent to the Act. The instant opinion questions the soundness of the decision. But as respondents contend that petitioner's riparian rights in its lands patented in 1885 were destroyed by the subsequent decision of Hough v. Porter, and as the Act is a Federal Act, petitioner is entitled to have it construed here in the interest of uniform construction of a Federal Act 31

(Washington and California, quoted in the opinion, refused to follow Oregon court's construction).

Conclusion 32

We suggest that the case calls for the exercise of the supervisory powers of the Court and the granting of the Writ 32

INDEX TO APPENDIX

(Chronologically arranged)

	Appendix Page, both numerals inclusive
OREGON 1909 WATER CODE	I-XXXIII
Sec. 1 Rights by appropriation subject to existing rights.	I
Secs. 2-10 Creates "Water Divisions"—superintendents thereof—who, with State Engineer, compose Board of Control—defines duties.	I-IV
Secs. 11-36 Providing for the initiation and conduct of adjudication proceedings before the board and the courts.	IV-XV
Secs. 36-44 Water-masters.	XV-XVIII
Secs. 45-54 Procedure for appropriation of water.	XVIII-XXIII
Secs. 55-69 Regulation – inspection – reservoirs – injunctions – penalties for violations – money appropriated to carry into effect.	XXIII-XXIX
Sec. 70 Vested rights preserved–includes eight subdivisions – subdivision 2 thereof said to define vested riparian rights	XXIX-XXXI XXIX-XXX
Sec. 72 Eminent Domain.	XXXII
Sec. 74 Emergency Clause (End of Act).	XXXIII

Appendix Page, both numerals inclusive

POLICE POWER—EMERGENCY CLAUSE ..... XXXIII-XXXV

Oregon Constitutional Referendum Amendment XXXIV

THE KADDERLY CASE, (44 Or. 118; 74 Pac. 710, 75 Pac. 222) ..... XXXV-XXXVIII
Construing referendum amendment—quotation.

CAMERON V. STEVENS, (121 Or. 538; 256 Pac. 395) ..... XXXVIII-XXXIX
On the referendum clause.

COLORADO ..... XXXIX-XL
Its referendum provision and decisions thereunder.

ARIZONA AND OHIO XL

COMMON LAW—STATES DETERMINE FOR THEMSELVES WHETHER THEY ADOPT COMMON LAW RIPARIAN DOCTRINE XL
Citing *Kansas v. Colorado*, 206 U. S., 46-118; 51 L. Ed. 956.

THE COMMON LAW ADOPTED ON ADMISSION OF OREGON ..... XLI-XLIII

THE COMMON LAW DOCTRINE OF RIPARIAN RIGHTS AS ANNOUNCED BY THIS COURT XLIII
Citing *U. S. v. Rio Grande Dam & I. Co.*, 174 U. S. 690; at 43 L. Ed. 1141.

STURR V. BECK, (133 U. S. 541-552; 33 L. Ed. 761) ..... XLIV-XLVI

FAULL V. COOK, 19 Or. 455; 26 Pac. 662) XLVI

BAKER V. BROWN, (39 Or. 66; 65 Pac. 799; 66 Pac. 193) XLVII

Appendix Page, both numerals inclusive

ADDITIONAL CASES SHOWING APPLICATION OF COMMON LAW DOCTRINE 1899 to 1912 ..... XLVII-XLVIII

HOUGH V. PORTER (51 Or. 318; 95 Pac. 732, 98 Pac. 1083) ..... XLVIII-L
Subdivision 28, at page 404.

THE DESERT LAND ACT, (Title 43, U. S. C. R., Secs. 321-2-3-4) ..... XLVIII-L

DECISIONS SUBSEQUENT TO THE ENACTMENT OF THE WATER CODE L-LIV
There are there cited:
In re Willow Creek, 74 Or. 593; 144 Pac. 505; 146 Pac. 475 L
The Norwood Case, 112 Or. 106; 227 Pac. 1111 LII

OREGON LEGISLATIVE RECOGNITION OF RIPARIAN RIGHTS ARISING FROM THE LOCATION OF RIPARIAN LANDS ALONG THE STREAMS ..... LIV-LIX
Session Laws of 1891 LIV
Session Laws of 1895 LV
Session Laws of 1899 LVI
Session Laws of 1903, amending that of 1899 LVII
Session Laws of 1901 LVIII
Session Laws of 1905 ..... LVIII-LIX

TABLE OF CASES CITED

Baker v. Brown, 39 Or. 66; 65 Pac. 799; 66 Pac. 193.

Basinger v. Taylor, (Idaho) 164 Pac. 522.

Bowman v. Bowman, 35 Or. 279; 57 Pac. 546.

Britt v. Reed, 42 Or. 76; 70 Pac. 1029.

Buchanan v. Warley, 245 U. S. 60; 38 Sup. Ct. 16; 62 L. ed. 149.

Cameron v. Stevens, 121 Or. 538; 256 Pac. 395.

Cantrall v. Sterling Min. Co., 61 Or. 516; 122 Pac. 42.

Carson v. Hayes, 39 Or. 97; 65 Pac. 814.

City & County of Denver v. N. Y. Trust Co., 229 U. S. 123; 57 L. ed. 1101.

Coppage v. Kansas, 236 U. S. 1; 59 L. ed. 441.

Cox v. Bernard, 39 Or. 53; 64 Pac. 860.

Davis v. Chamberlain, 51 Or. 304; 98 Pac. 154.

Ex Parte Tyler, 149 U. S. 164; 13 Sup. Ct. 785; 37 L. ed 687.

Faull v. Cooke, 19 Or. 455; 26 Pac. 662.

Fidelity etc. Co. v. St. Bank of Portland, 117 Or. 1; 242 Pac. 823.

Harriman v. Northern Sec. Co., 197 U. S. 244; 49 L. ed. 739.

Harris v. Southeast Portland Lbr. Co., 123 Or. 549; 262 Pac. 243.

Hough v. Porter, 51 Or. 318; 95 Pac. 732, 98 Pac. 1083.

In re Senate Res. Number 4, (Colo.) 54 Colo. 262; 130 Pac. 333.

In re Willow Creek, 74 Or. 593; 144 Pac. 505; 146 Pac. 475.

Ison v. Sturgill, 57 Or. 109; 109 Pac. 579; 110 Pac 535.

Kadderly v. Portland, 44 Or. 118; 74 Pac. 710; 75 Pac. 222.

Kansas v. Colorado, 206 U. S. 46; 27 Sup. Ct. 655; 51 L. ed. 956.

Larsen v. O. R. & N. Co., 19 Or. 240; 23 Pac. 974.

Lochner v. New York, 198 U. S. 45; 49 L. ed. 937.

Logan v. Spaulding Logging Co., 100 Or. 731; 190 Pac. 349.

Lowe v. Harris, 112 N. C. 472; 17 S. E. 539; 22 L. R. A. 379.

Mace v. Mace, 40 Or. 586; 67 Pac. 660; 68 Pac. 737.

Marshall v. Niagara Spgs. Orch. Co. (Idaho) 125 Pac. 208-213.

Meccano v. Wanamaker, 253 U. S. 136; 64 L. ed. 822.

Missouri Pacific R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed 489.

Norwood v. Eastern Oregon Land Co., 112 Or. 106; 227 Pac. 1111.

Oregon Const. Co. v. Allen, 41 Or. 209; 69 Pac. 455; 93 Am. St. Rep. 701.

Orme v. Salt River W. U. Ass'n., 25 Ariz. 324; 217 Pac. 935.

Pacific Live Stock Co. v. Lewis, 241 U. S. 440; 60 L. ed 1084.

Penn. Coal Co. v. Mahon, 260 U. S. 393; 67 L. ed. 322.

Re Water Rights of Hood River, 114 Or. 112; 227 Pac. 1065.

Shields v. City of Loveland, 74 Colo. 27; 218 Pac. 913.

Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331.

State ex rel. v. Smith, 102 Ohio State 591; 133 N. E. 457.

Sturr v. Beck, 133 U. S. 541; 33 L. ed. 761.

Tobey v. Bridgewood, (Idaho) 127 Pac. 178.

United States F. & G. Co. v. Bramwell, 108 Or. 261; 217 Pac. 332.

U. S. v. Rio Grande Dam & I. Co., 174 U. S. 690; 19 Sup. Ct. 770; 43 L. ed. 1141.

Van Kleeck v. Ramer, 62 Colo. 4; 156 Pac. 1108.

Washington St. Sug. Co. v. Goodrich, (Idaho) 147 Pac. 1073.

Weiss v. Oregon Iron & Steel Co., 13 Or. 496; 11 Pac. 255.

Wyoming v. Colorado, 259 U. S. 419; 42 Sup. Ct. 552; 66 L. ed. 999.

Yates v. Milwaukee, 77 U. S. (10 Wall.) 497; 19 L. ed. 984.

CONSTITUTIONS CITED

United States Constitution, Fourteenth Amendment.

Oregon Constitution, Sec. 1, Art. IV, Referendum Amendment (Oregon Laws 1930, page 96).

Oregon Constitution, Sec. 4, Art. XI, (Oregon Laws 1930, page 172).

STATUTES CITED

Judicial Code, Sec. 24 Amended, 28 U. S. C. A. Sec. 41.

Judicial Code, Sec. 128; (36 Stat. at L. 1133, Ch. 231 Comp. Stat. Sec. 1120, 5 Fed. Stat. Anno. 2d ed. page 607; 28 U. S. C. A. Sec. 225).

Judicial Code, Sec. 240; 28 U. S. C. A. Sec. 347.

The Desert Land Act of March 3, 1877; (19 Stat. 377; 43 U. S. C. A. Sec. 321).

United States Compiled Statutes of 1901, Vol. 2, Sec. 2476, Revised Statutes; (Sec. 9, Ch. 29, Act of May 18, 1796). 43 U. S. C. A. Sec. 931.

Oregon Laws, 1891.

Oregon Laws 1895.

Oregon Laws, 1899.

Oregon Laws, 1901.

Oregon Laws, 1903.

Oregon Laws, 1905.

Oregon Laws, 1909; (Ch. 216) (Oregon Water Code) —Appendix I-XXXIII.

In the Supreme Court of the United States

OCTOBER TERM, 1934

THE CALIFORNIA OREGON POWER COMPANY, *(a corporation)*, *Petitioner*,

vs.

BEAVER PORTLAND CEMENT COMPANY, *a Corporation, and* CITY OF GOLD HILL, OREGON, *a Municipal Corporation*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT (AND BRIEF IN SUPPORT THEREOF)

To the Honorable, the Supreme Court of the United States:

I.

SUMMARY AND STATEMENT OF MATTER INVOLVED

This is a suit in equity brought by petitioner in the United States District Court for the District of Oregon. The petitioner, a resident of the State of California, owning the property involved herein, in Ore-

gon, claimed the jurisdiction of the Federal District Court solely upon the ground of diverse citizenship.

Bill of Complaint is at R. 4.

Rogue River, a meandered, non-navigable stream, flows in a southerly direction through and over the lands of the petitioner and of the respondents, and the thread of said stream as it naturally exists, is the boundary of the lands of the respective parties.

At the place in controversy Rogue River flows in a southerly direction, dividing the respective lands quite equally.

Respondent Cement Company attempts by appropriation permits issued ex parte and by destruction of the channel on its side of the river, to draw all of the water off of petitioner's lands, except enough for a "fishway," thereby changing petitioner's west boundary, moving it westward 100 to 150 feet.

Petitioner claims its lands are riparian and that the common law riparian right attached to them when the patent was issued to petitioner's predecessor, Francis Marion Fredenburg, April 20, 1885. (Defendant's Exhibit W. R. 301-3—Copy of U. S. Patent).

It is admitted that petitioner acquired said lands by purchase, March 11, 1921.

BLASTING OF RIVER BED

On the evening of July 21, 1930, respondent Cement Company, without knowledge or consent of plaintiff, dynamited the bed of the river on its side of the thread

of the stream; it thereby shattered and broke the rock bed of the stream for more than 50 feet up and down the stream, and for more than 50 feet in width, and approximately five to eight feet deep. When enjoined in this case it was removing, and threatening to continue to remove, the shattered rock from the river bed, which act would suck all of the waters of the stream from petitioner's land, into a new channel in the bed of the old channel, to be made by the cleaning out of said blasted area.

With the river in a state of nature, and without removal of the rock from the blasted area, the total water appropriated for the City, (220 second feet on its side, and 75 second feet on petitioner's side of the river), flows naturally into the City's little plant. The blasting and the attempt to remove the rock from the blasted area, was for the purpose of taking the entire 1347 second feet under the Ex parte permits issued by the State Engineer, acting under the Oregon 1909 Water Code. (The 1909 Code is printed in full at Appendix to Brief, pages I to XXXIII, inclusive).

Petitioner claims the common law riparian right to maintain the bed of the stream intact, as adjudicated by the Oregon Supreme Court, and the right to prevent destruction of the channel of said river in front of petitioner's riparian lands; that the removal of the shattered rock in the blasted area would make a new channel for said river, sucking the waters thereof off

petitioner's land, and leaving a dry gravel bar between plaintiff's land and the race or channel which would have been made by the removal of said blasted rock. It asks the aid of equity to protect its vested rights in said riparian lands, and to protect such rights from further depredations. It maintains that the Appellate Court erred as set forth in the following nine "Reasons Relied Upon for the Issuance of the Writ Herein."

II.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

This Court has authority to issue the writ and bring the cause here by certiorari, because the decree of the United States Circuit Court of Appeals for the Ninth Circuit is final by Section 128, Judicial Code, (36 Stat. at L. 1133, Chapter 231 Comp. Stat. § 1120, 5 Fed. Stat. Anno. 2d ed. page 607).

Petitioner relies upon

Meccano v. Wanamaker, 253 U. S. 136, 64 Law ed. 822,

and also upon

Denver v. N. Y. Trust Company, 229 U. S. 123, 131, 136, 57 Law ed. 1101, 1121,

where it is said such rights lie where the Federal Court jurisdiction *depends entirely upon diverse citizenship.* And where it is also said that this is not changed though questions arise under the 14th Amendment, due process clauses, etc., that

The Appellate Court's jurisdiction also depends upon

diverse citizenship, which precludes an appeal to this Court, from the decree of the Circuit Court of Appeals. The case further holds that upon the granting of the writ under circumstances such as these, the whole matter may be determined in this Court.

The petitioner also relies upon

Harriman v. Northern Securties Co., 197 U. S. 244, 287, 49 Law ed. 739, 760, 25 Sup. Ct. Rep. 493.

This and the case of Denver v. New York Trust, supra, are cited in the opinion of Mr. Justice McReynolds in Meccano v. Wanamaker, supra.

Petitioner states the following grounds for the allowance of the writ:

1. The opinion in the instant case is in direct conflict with a decision of this Court in the construction of Section 70 of Oregon's Water Code of 1909, which declares vested rights are preserved. (Code set forth in full in Appendix pages I-XXXIII).

2. The opinion in the instant case is in conflict with a controlling decision of the Oregon Supreme Court (1920), construing Section 4 of Article XI of the Oregon Constitution. (The case is Logan v. Spaulding Lumber Company quoted in the dissenting opinion at R. 462).

3. The opinion is in conflict with the decision of the Oregon Supreme Court in the Norwood case, which decision should have been controlling, because it was

in harmony with a decision of this Court in the construction of the identical section of said Water Code involved here. (Section 70, *supra*).

4. The opinion is in conflict with the decisions of this Court construing the 14th Amendment to the Federal Constitution in these particulars, namely:

(a) The construction under the "Due process of Law" clause. And

(b) The construction under the Equal Protection of the Law clause.

The opinion holds that petitioner's vested rights were destroyed by said Water Code, enacted after such rights had vested. (R. 450). And the opinion follows an Oregon case (Re Water Rights of Hood River), which construes said Section 70 of said Water Code as destroying all riparian rights that had not, prior to its enactment, been put to beneficial use, but preserves those that had been put to beneficial use. Petitioner's vested riparian right, not having been put to a beneficial use prior to said enactment, petitioner is denied the equal protection of the laws, in that all whose rights had been so beneficially used, are protected to the extent of their use, and the subsequent development of such use.

5. The writ should be allowed because petitioner and others similarly situated acquired their riparian rights on Oregon streams at times when under the decision of this Court, and the decisions of the Oregon

court, such rights became vested property rights on the issuance of the patent to the riparian lands. The Water Code enacted subsequent to the issuance of such patents, could not destroy said rights.

6. The writ should be allowed because petitioner's lands were patented after the enactment of the Desert Land Act, and the Oregon Supreme Court in Hough v. Porter, decided in 1909, prior to the enactment of the Water Code of that year, construed said federal statute as destroying riparian rights in lands patented subsequent to March 3rd, 1877, the date of said Federal Act. Hence the opinion here should have definitely determined such construction to be erroneous. But at page (R. 429) of the opinion it is stated:

That the Court will pass upon that matter *if* the Hood River case, and said Water Code can withstand petitioner's attacks on constitutional grounds. Although it, subsequently, in the opinion questioned the soundness of the Hough v. Porter construction of the Act.

The dissenting opinion is opened with the statement that Mr. Justice Wilbur concurs in the portion which construes said Desert Land Act.

7. The writ should issue because of the conflicting decisions of the Oregon Supreme Court rendered since petitioner acquired its said riparian rights, and which decisions are so confusing and conflicting as to make it in the interest of harmony in the law for this Court

to pass upon said Section 70 of said Water Code. Said Oregon Supreme Court decisions made subsequent to petitioner's acquiring said land, construe said Section 70 of said Water Code *both to have* and *not to have destroyed vested riparian rights not put to beneficial use before the enactment of the Water Code.*

8. The writ should issue because the opinion herein erroneously holds that the Oregon Legislature in the 1909 Act exercised the police power of the State, in the passage of Section 70 of said Water Code, as so construed in said Hood River case.

The effect of the emergency clause, as construed in the opinion herein (R. 444) is, we think, erroneous. Such an emergency clause is not a declaration of police power, but is provided by referendum amendment to the Oregon Constitution to prevent legislative acts, to which the clause is attached, from being referred to the people for a vote. This being the construction of the Oregon Supreme Court, it should have been followed herein.

9. This writ should issue because the decision of the Appellate Court should have held that on its admission, Oregon adopted the common law doctrine of riparian rights then in force, and that the same were in force at the time of the passage of the 1909 Water Code, and such rights acquired prior to that enactment could not be changed thereby.

WHEREFORE PETITIONER PRAYS, that a writ of certiorari issue under the seal of this Court to the United

States Circuit Court of Appeals for the Ninth Circuit commanding said court to certify, and to send to this Court, a full and complete transcript of the record and proceedings in said Appellate Court in this case, cause numbered there 6874, entitled "The California Oregon Power Company, a corporation, Appellant, v. Beaver Portland Cement Company and City of Gold Hill, Oregon, a municipal corporation, Appellees," to the end that the cause may be fully reviewed and all matters and issues therein, determined here. That upon a hearing, the judgment of said Circuit Court of Appeals be reversed, and decree be entered reversing the decree and judgment of the District Court of the United States for the District of Oregon, from which said appeal was taken; and enjoining defendants, and the successors of each, from further destruction of the bed of the stream, Rogue River, where the same described in the Bill of Complaint herein, and restraining them and each of them from removing the rock in the bed of the said river, shattered and broken by the explosions and dynamiting thereof, alleged in the Bill of Complaint herein, and from thereby diverting or changing the channel of said Rogue River, where it flows between the lands of the respective parties hereto; decreeing the petitioner's riparian rights to be common law riparian rights, which attached to petitioner's said lands at the issuance of the patent therefor, and determining that Chapter 216

of the Oregon Laws of 1909 did not deprive the petitioner of its said common law rights in its said lands; and decreeing that such rights were unaffected by the passage of the Desert Land Act of March 3rd, 1877; decreeing that petitioner's said riparian rights are unaffected by the decision of the Supreme Court of Oregon, entitled "In Re The Water Rights of Hood River," reported at 114 Oregon, 112 et seq.

And that the petitioner have a decree for such other and further relief as is usual in such cases.

Respectfully submitted,

Counsel for Petitioner.

CERTIFICATE OF COUNSEL

I, A. E. REAMES, as attorney for the petitioner herein, hereby certify that in my opinion the foregoing petition is well founded, and further certify that the same is not interposed for delay.

A. E. REAMES,
Counsel for Petitioner.

STATE OF OREGON,
COUNTY OF JACKSON. } ss.

I, E. L. LENOX, being first duly sworn, depose and say:

That I am Secretary of the petitioner; that the foregoing petition is true as I verily believe.

E. L. LENOX,

Subscribed and sworn to before me this 22nd day of December, 1934.

W. J. LOOKER,
Notary Public for Oregon.
(My commission expires June 20th, 1938)

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

(a) Original jurisdiction of this cause by the District Court of the United States for the District of Oregon was obtained under Sec. 41 (1) (Judicial Code, Section 24, amended), Title 28, U. S. C. A., providing that such district court shall have original jurisdiction of civil suits at common law or in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00 and (b) is between citizens of different states.

(b) The date of the decree of the district court is March 11, 1932. (R. 79); (Decree of district court, R. 78-79).

(c) Opinion of appellate court was rendered and filed November 5, 1934—set forth in transcript page R. 411-451; Dissenting opinion in transcript of record, pages 452-478, filed November 5, 1934. Both opinions are reported in Federal Reporter, (Second Series), page ——.

(d) Date of the entry of the decree in the appellate court, November 5, 1934. (R. 479-480).

JURISDICTION

The statute under which jurisdiction of this court is invoked is Section 240, Judicial Code, (Title 28, U. S. C. A., Section 347).

STATEMENT OF FACTS

The facts material here are set forth in the summary

and statement of matter involved, at page 1, subdivision 1, of the petition for writ of certiorari, reference being hereby made to the same, and the same being made a part hereof.

Briefly, the petitioner acquired its lands involved in this controversy by purchase from the patentee thereof, March 11, 1921.

The lands of both petitioner and respondents are riparian to the Rogue River, a natural, non-navigable, meandered stream, flowing southerly over and between said lands of the respective parties.

Petitioner's lands were patented April 20, 1885, by patent set forth at R. 301-303. The petitioner is a public service corporation, manufacturing and supplying electrical current, as a public utility, to consumers in the vicinity of the scene of this controversy. It acquired its said lands because they are near the place of distribution of its electrical current. It acquired said lands and held the same for the construction thereon of a stand-by electric plant for the manufacture of current close to the place of distribution, to supply service in case of breakdowns in long transmission lines.

July 21st, 1930, respondent Cement Company, not having access to build its appropriation works on plaintiff's land, exploded dynamite in the river bed for the purpose of thereby making a channel which would draw the water from petitioner's lands. Petitioner obtained a restraining order in the District Court re-

straining further blasting and the removal of the blasted rock.

Petitioner claims its rights as a riparian proprietor owning common law riparian rights.

Petitioner maintains that on its admission, Oregon adopted the common law, and with it the common law riparian doctrine; that said lands bordering upon Rogue River carry with them the common law riparian rights in said stream; that said rights attached to said lands and passed to the patentee thereof upon the issuance of the patent therefor on April 20th, 1885. And that when said lands passed by mesne conveyances to petitioner, petitioner acquired said riparian rights which had vested at the issuance of the patent; that they were part and parcel of the land and could not be lost by nonuser.

Respondents are also riparian owners on the stream, but their claim here is under uncompleted water permits issued by the State Engineer.

They claim petitioner's riparian rights were destroyed by Section 70 of said Water Code, because they were not used prior to enactment of the Code, as it was construed by the Oregon Supreme Court in the Hood River case in 1924, after petitioner's purchase of the lands.

They also claim under the Oregon case of Hough v. Porter, (1909), that lands patented after the date of the Desert Land Act, March 3rd, 1877, carried no

riparian rights, said Federal Act being held to have abolished the same.

The decision of the Appellate Court adopted the decision in said Hood River case, and held that petitioner's said riparian rights were lost by the enactment of Section 70 of said Water Code. It also held that the Oregon Legislature through the emergency clause attached to said Chapter 216, Laws of 1909, declared that said Act was the exercise of the police power of the state, justifying regulation of the use of petitioner's riparian rights. But as so construed, both the Desert Land Act and said Water Code, at the respective dates of their enactment, cut off absolutely the riparian rights in petitioner's lands. This, petitioner denies.

II.

SPECIFICATION OF ERRORS

Petitioner specifies the following errors in the decision of the Appellate Court, and upon which it relies:

1. The decision violates Section 4 of Article XI of the Oregon Constitution, as construed by the Oregon Supreme Court, June 15th, 1920, which decision should have been followed.

2. The decision violates the "Due Process of Law" clause, of the 14th Amendment to the Federal Constitution, in the taking of private property without due process of law.

3. It violates the "Equal Protection of the Laws" clause of the 14th Amendment in this:

It *especially preserves* rights of riparian owners who had used their rights for beneficial purposes before the enactment of the Water Code of 1909, *but denies this same privilege to all who* had *not* so used theirs, and in which class petitioner is.

4. The Appellate Court erred in not construing the Federal Act of March 3rd, 1877, known as the "Desert Land Act," because the Oregon Court had construed it as destroying riparian rights in lands patented after its enactment. Petitioner is entitled to have that question passed upon by the Federal Court.

5. The Appellate Court erred in not reversing the judgment of the District Court, and decreeing an injunction protecting the channel of Rogue River from further blasting or removal of rock already blasted therein.

6. And in failing to decree that petitioner's riparian rights were unaffected by the Desert Land Act, or by Chapter 216 of the laws of 1909.

7. It erred in holding that *Section 70* of the Oregon Water Code of 1909 was an exercise of the police power, *regulating* petitioners' riparian rights, whereas, as construed it took and confiscated the same. The Court erred in not construing said *Section 70* of the Water Code in accordance with the decision of this Court,

directly construing the same as not impairing vested rights.

III.

JURISDICTION

To support the jurisdiction of this Court in determining all of the issues in this case, and considering that the original jurisdiction of the District Court was obtained upon the ground of diverse citizenship, under Judicial Code § 24, as amended, (Title 28, Sec. 41 (1), (b), U. S. C. A.) petitioner cites:

> *City and County of Denver v. N. Y. Trust Company*, 229 U. S. 123, 133, 136; 57 Law ed. 1101, 1120, 1121,

holding as follows:

That the Appellate Court maintained its jurisdiction upon the ground of diverse citizenship, and *its decision was final*, and *its decree determined the entire cause. No appeal under Section 128 of the Judicial Code (cited in Petition) can be had from said decree.*

Petitioner also cites:

> *Harriman v. Northern Securities Co.*, 197 U. S. 244, 287, 49 Law ed. 739, 760,

and the cases there cited at 197 U. S. 287, to the effect that the entire cause may be disposed of herein, the Court of Appeals having finally disposed of said cause in its decree.

Also

> *Missouri Pacific v. State of Nebraska*, 164 U. S. 403, 41 Law ed. 489.

Also

Lowe v. Harris, 112 N. C. 472, 17 S. E. 539, 22 L. R. A. 379,

cited in the dissenting opinion (R. 467-8).

Buchanan v. Warley, 245 U. S. 60-82; 38 Sup. Ct. 16; 62 Law ed. 149.

This case holds that the 14th Amendment protects both the property right and the said attributes of property and prevents discrimination.

Penn. Coal Company v. Mahon, 260 U. S. 393-422, 67 Law ed. 322.

Lochner v. New York, 198 U. S. 45-76, 49 Law ed. 937.

Coppage v. Kansas, 236 U. S. 1-42, 59 Law ed. 441.

ARGUMENT

Summary.

On its admission, Oregon adopted the common law,—with it the common law riparian doctrine. Its Supreme Court so adjudicated until after petitioner acquired its lands, March 21, 1921, to wit: until 1924, when it decided the Hood River case. That decision construed Section 70 of the Water Code of 1909 as destroying riparian rights that had not been used before its enactment. The code preserved such rights as had been so used. Under all earlier decisions of the State Court, such riparian rights were preserved, regardless of use.

The decision below conflicts with the decision of this court in Pacific Live Stock Co. v. Lewis expressly

construing said *Section 70* as preserving *such vested rights.* (Cited below).

The decision violates *Section 4 of Article XI of the Oregon Constitution* as construed by the state court in Logan v. Spaulding Logging Company, June 15th, 1920, before petitioner acquired its lands. It held that *any impairment* of a riparian right, or of use thereof, violated said constitutional provision. The decision should have been followed by the appellate court.

Police Power.

Respondent cement company was dynamiting and destroying the river channel when enjoined at the institution of this suit. Under the Oregon decisions cited, this is a proper remedy. The court can require such riparian channel to be restored. (Cases cited).

The majority opinion herein holds that the water code of 1909 (Section 70) did not so modify petitioner's riparian rights as to destroy same, but only *regulated* the same, by the exercise of its police power. This is to construe the exercise of a police power as a *taking*, rather than as a *regulation.*

THE COMMON LAW RIPARIAN DOCTRINE

A State, when admitted, may determine for itself whether it will adopt doctrine of riparian rights or doctrine of appropriation.

This court, in

Kansas v. Colorado, 206 U. S., pages 46-118, 27 Sup. Ct. 655, 51 L. ed. 956

so determined. Full quotation at Appendix pages XL-XLI.

On its admission, Oregon adopted Common Law.

This court so decided in

Shively v. Bowlby, 152 U. S. 1, 58; 38 L. ed. 331, 350.

Quotation therefrom, appendix, page XLII.

The Oregon Supreme Court so held in

United States F. & G. Co. v. Bramwell, 108 Or. pages 261-289; July 10, 1923 (217 Pac. 332)

quoted at appendix page XLII.

Here is cited Section 2, Article 1 of the organic law of provisional government of 1845, and section 7, article XVIII of the Constitution of 1857. We believe this Court will accept the decision of the Oregon Court upon this matter without further quotation.

Oregon Courts Bound by the Applicable Rules of the Common Law unless Modified or Abrogated by Statute.

To this effect is:

Fidelity, etc., Co. v. State Bank of Portland, 117 Or. 1, 5. January 19, 1926; 242 Pac. 823

quoted at appendix page XLIII.

This Court has Announced that the Common Law Doctrine of Riparian Rights Prevails in Oregon.

This is the decision in

U. S. v. Rio Grande Dam & I. Co., 174 U. S. 690, 702; 19 Sup. Ct. 770, at 43 L. ed. 1141,

from which we quote at appendix, page XLIII.

It is there stated that it is the unquestionable rule of the common law that every riparian owner is en-

titled to the natural flow of the stream, etc.; that every proprietor of lands on a stream bank has naturally an equal right to the use of the water which flows in the adjacent stream; that no proprietor has a right to use the water to the prejudice of the other proprietor above or below him; that he has no property in the water, but a usufruct while it passes along; though he has the use, he cannot unreasonably detain it or give it another direction.

This Court has decided, in 1890, that such riparian rights attached to the soil on settlement.

We refer to

Sturr, appellant v. Beck, 133 U. S. 541-552, 33 L. Ed. 761. (Decided Mar. 3, 1890)

from which we make quotation in the appendix at page XLIV.

The Oregon Supreme Court followed STURR v. BECK immediately following the announcement of that decision.

We quote from

Faull v. Cooke, 19 Or. 455-467, 26 Pac. 662; (decided July 1, 1890)

at appendix page XLVI.

It is there held that the homestead claimant's riparian right attached at the date of settlement, provided be obtained patent, "*and cut off the right to divert a stream of water running through such homestead.*"

In 1901 the Oregon Supreme Court followed FAULL v. COOKE, and the Larsen Case cited in Faull v. Cooke, in

Baker v. Brown, 39 Or. 66-75; 65 Pac. 799; 66 Pac. 193 (Decided July 15, 1901)

We quote from it at appendix page XLVII, in substance as follows:

The right of a prior appropriation is limited to the use made before any adverse claims of riparian proprietors attach to the stream.

The Oregon Supreme Court, between 1899 and 1912, decided numerous cases to the effect that the riparian right can only be destroyed through an adverse appropriation for the prescription period of ten years.

Some of them are listed at appendix pages XLVII-XLVIII.

The Oregon Supreme Court in 1886 in a case involving riparian use of water for making power held that it was a well settled law that where a stream is meandered in public surveys, the stream and not the meander line, is the true boundary of the riparian owner; that such owner is entiled to have the natural flow of the water in its accustomed channel and maintained at its heighth. Its right cannot be taken away except by grant or prescription. It defined further the true riparian doctrine. It is

Weiss v. Oregon Iron & Steel Co., 13 Or., 496 (11 Pac. 255).

In 1928, four years after the decision in Re the Water Rights of Hood River, the Oregon Supreme Court cited and quoted the Weiss case with approval, holding that the riparian's right is inseparably annexed to the soil and exists jure naturae as parcel of the land "which right will not be suspended or destroyed by mere nonuser." The case is

Harris v. Southeastern Lumber Company, 123 Or. 549-556 and 557, (262 Pac. 243) *(1928)*

LEGISLATIVE RECOGNITION OF THE COMMON LAW RIPARIAN DOCTRINE

The Oregon Legislature frequently recognized this doctrine by "allowing the condemnation of rights of riparian proprietors *arising from their location.*"

In the Appendix LIV to LIX quotations are made from the titles and the body of the Acts sufficient to support the statement. The Acts are for the years 1891, 1895, 1899, 1903, 1901 and 1905.

THE DECISION OF THE APPELLATE COURT HEREIN VIOLATES SECTION 4 OF ARTICLE XI OF THE OREGON CONSTITUTION, THE "DUE PROCESS OF LAW" CLAUSE, AND THE "EQUAL PROTECTION OF THE LAWS" CLAUSE OF THE 14TH AMENDMENT TO THE FEDERAL CONSTITUTION, AND CONFLICTS DIRECTLY WITH A DECISION OF THIS COURT.

1. In

Logan v. Spaulding Logging Co., 100 Or. 731, 736, (190 Pac. 349),

quoted in the dissenting opinion (R. 462), decided *June 15th, 1920*, the Supreme Court of Oregon held an Act of the Oregon Legislature impairing vested riparian rights as violative of said Section 4, Article XI of the Oregon Constitution, which reads:

"**§ 4 Compensation for Property Taken by Corporation.** No per-

> son's property shall be taken by any corporation, under authority of law, without compensation being first made or secured in such manner as may be prescribed by law."

asserting that

> "interference with the natural flow of the stream, in so far as it injures the riparian proprietor, or interferes with his enjoyment of his right to the use of the stream, is a taking *pro tanto* of his property, which is governed by the constitutional provision above quoted."

The opinion in the instant case should, in our belief, have followed this construction of the Oregon constitutional provision.

2. The decision violates the "Due Process" clause of the 14th Amendment in that it takes this private property for a public use without compensation.

Missouri Pacific v. State of Nebraska, supra.

3. It violates the "Equal Protection of the Laws" clause of the 14th Amendment in that it discriminates in the taking of the vested right of the riparian, who had not at the enactment of the Water Code used his right, and protects such a right held by one who did use his, prior to the enactment of the Code, and gives to such other, or to anyone else, the right to take the waters, the use of which has been thus destroyed. As so construed it is unconstitutional under the authority of this Court in

Buchanan v. Warley, supra, and other cases cited.

4. It violates the decision of this Court which con-

strued the identical Section 70 of the 1909 Water Code, in this:

The majority opinion at R. 450 holds:

> "We conclude then, that the riparian owner's right to the natural flow of the stream substantially undiminished has been validly abrogated by the Water Code of 1909 as construed by the Oregon court. Plaintiff's assertion of such a right in this case cannot, therefore, be sustained."

That was based upon the doctrine in the Hood River case, expressed at 114 Ore., page 181, in which it is said:

> "It was within the province of the Legislature by the act of 1909, *to define a vested right* of a riparian owner, or to establish a rule as to when and under what condition, and to what extent a vested right should be deemed to be created in a riparian proprietor."

It followed at page 182 by abolishing the right of the Power Company, by stating:

> "Under our present statute (meaning Section 70 of the 1909 Water Code) defining what shall constitute a vested right of a riparian proprietor, the claim of the Pacific Power and Light Company as a riparian owner of land on Hood River to a continuous flow of the specified quantity of water over its land cannot be maintained."

In

Pacific Livestock Company v. Lewis, 241 U. S. at page 445, 60 Law Ed. at page 1095,

this Court, referring to *Section 1 and Section 70* of said 1909 Water Code, said:

> "That the statute is not intended to take away or impair any vested right to any water or to its use is expressly declared in its 1st and 70th sec-

tions, 3 Lord's Oregon Laws, §§ 6594, 6595." (47-403, 47-404 Or. Laws 1930),

In that case this Court considered

Re Willow Creek. 74 Or. 592, 631, 617, (144 Pac. 505),

in which opinion the Oregon Supreme Court in that *water adjudication under that Water Code* said:

> "The doctrine of prior appropriation and riparian rights is not so antagonistic that they may not exist in the same locality.' (From 74 Or. 626). * * * * And that when such riparian rights "have become vested, they cannot be taken away by legislative enactment nor judicial decree. Like all property they are subject to reasonable regulation." (From the Oregon Report, page 627). Appx. L.

Yates v. Milwaukee, 77 U. S. (10 Wall.) 497-507 defined such a riparian right as such valuable property and we take this quotation from 19 Law Ed., page 986:

> "This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. *It is a right of which, when once vested, the owner can only be deprived in accordance with established law*, and if necessary that it be taken for the public good, upon due compensation."

THE RIVER BED

By the terms of the Federal Act of May 18, 1796, and still in force, it is provided that in all cases, like this one, where the *opposite banks of a non-navigable stream belong to different persons, both the stream and the bed of the stream become common to both.*

We construe this to mean that they are common

owners in the right to use both the stream and the stream bed. Here, the respective owners actually own to the thread of the stream. This thread is the boundary of the respective parties, separting their lands. But together they have the right to use both the stream and the stream bed, as provided by the Federal Statute. The bed is the way, or course, for the stream. The right of use is, under the statute, joint, as between the owners of the opposite banks of the stream. We cite the statute:

Section 9 of Chapter 29 of the Act of May 18, *1796*, being Revised Statutes, Section 2476, as printed in Volume 2 of the United States Compiled Statutes of 1901, reads:

> "Sec. 2476. Navigable rivers within public lands to be public highways.
>
> All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the *stream and the bed* thereof shall become common to both.
>
> Act May 18, 1796, c. 29, Sec. 9, 1 Stat. 468. Act March 3, 1803, c. 27, Sec. 17, 2 Stat. 235."

THE REMEDY INJUNCTIVE RELIEF

The remedy herein is an injunction to restrain further blasting or removal of rock from the blasted area; destroying the river banks or river channel, etc.

> *Mace v. Mace*, 40 Or. 586, (67 Pac. 660; 68 Pac. 737),

holding that equity will compel restoration of the

stream to its natural position and to permit it to so remain.

It cites:

Cox v. Bernard, 39 Or. 53, (64 Pac. 860).

The opinion in Weiss v. Oregon Iron Works, (1886), supra, determines that injunction is proper to restrain diversions from the channel.

RESPONDENT'S PERMITS

Respondents' permits for the use of water were issued Ex parte by the State Engineer.

Tobey v. Bridgewood, 127 Pac. 178-185 (Supreme Court of Idaho. Oct. 3, 1912).

Washington State Sugar Co. v. Goodrich, 147 Pac. 1073, 1076. (Supreme Court of Idaho. April 28, 1915).

Basinger v. Taylor, 164 Pac. 522-528. (Supreme Court of Idaho. April 3, 1917).

Marshall v. Niagara Springs Orchard Co., 125 Pac. Rep. 208-213. (Supreme Court of Idaho. June 8, 1912).

It was held in

Wyoming v. Colorado, 259 U. S., pages 419-496; 42 Sup. Ct. 552; 66 Law Ed. 999, 1023.

that such permits issued under a similar statute of Wyoming were not, in law, adjudications; are mere licenses to appropriate, and as to many, nothing ever is done. In such cases there are no appropriations.

POLICE POWER

The majority opinion herein (R. 444), sets forth the Emergency Clause attached to the 1909 Water Code,

as the same is printed at Appendix XXXIII. It is Section 74. The Court first states:

> "The Oregon Code of 1909 itself purported to be an exercise of the police power of the State as shown by Section 74."

The Supreme Court of Oregon in

Kadderly v. Portland, 44 Or. 118, (Dec. 1903), (74 Pac. 710, 75 Pac. 222).

construed the Referendum Amendment of the Oregon Constitution, from which this emergency clause is taken. That Amendment, so far as pertains to this matter is copied at Appendix XXXIV-XXXV.

The Kadderly case holds that the purpose of that emergency clause is to prevent legislative acts from being referred to a vote of the people; the language of the Amendment is broader and includes *all laws of whatever kind* necessary for the immediate preservation, etc., *whether they impose restraints on persons and property, or come strictly within the police power;* that it is the duty of the courts to determine whether it conflicts with the fundamental law. Quoted, App. XXXV.

See

Cameron v. Stevens, 121 Or. 538, (1927) (256 Pac. Rep. 395) (Appx. XXXVIII).

Colorado, Arizona and Ohio took their similar referendum Amendments from Oregon, and followed the Kadderly case. (Appendix XXXIX-XL).

In Pacific Livestock v. Lewis, supra, this Court

quoted from the Willow Creek, supra, as having said:

> "The state enacted the law of 1909 thereby to a *limited extent* calling into requisition its police power." (From 241 U. S. 449, 60 Law Ed. 1097).

Mr. Justice Henry Bean, wrote the opinions in both the Willow Creek and Hood River cases. We believe that this Court did not consider Section 70 of the Water Code, the exercise of a police power, or as taking any vested rights.

What Constitutes Exercise of Police Power in regulation.

This court, in

Pennsylvania Coal Co. v. Mahon, 260 U. S. 393-422; 67 L. ed. 322

and following, at page 416 of the U. S. report said:

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."

In

Lochner v. New York, (supra)

this court said, in effect, that the court cannot shut its eyes to the fact that many laws that are not the exercise of police power are camouflaged as such, and for that reason the Court should consider the character of the law.

The Supreme Court of Oregon, in the Willow Creek case, supra, stated that both the doctrine of riparian proprietorship and of appropriation could exist in the same community, and it did, in that case, adjudicate both classes of rights.

Petitioner has a riparian use for generating power, always recognized in the common law.

See

Buchanan v. Warley, supra.

In

Coppage v. Kansas, supra,

this court held, in effect, that when a party appeals to this court for the protection of rights secured by the Federal Constitution, the decision is not to depend upon the form of the state law, nor even upon its declared purpose, but rather upon its operation and effect as applied and enforced in the state.

The Desert Land Act.

The four sections of the act which might be material here are fully set forth in the appendix at pages XLVIII-L. The fifth section has no relation to matters here treated.

We feel that the appellate court really determined that the Hough v. Porter construction of the act cannot be accepted. The senior judge, Mr. Justice Wilbur, began his dissenting opinion with his concurrence in this determination. Our fault with the main opinion is that it avoids directly deciding the question.

Petitioner is entitled to have the Federal Court construe federal statutes.

Ex Parte Tyler, 149 U. S. 164-192, 13 Sup. Ct. 785, 37 Law Ed. 689, 697. (April 24, 1893).

This question is really of great public concern, and

as the opinion shows, has been construed differently in the supreme courts of several states.

CONCLUSION AND PRAYER

It is, therefore, respectfully submitted that this is a case calling for the exercise by this Court of its supervisory powers by granting a Writ of Certiorari herein, and thereafter reviewing and reversing the decision of the Appellate Court; that petitioner have a decree as prayed for in its Bill of Complaint, and granting such other and further relief as shall be mete in equity.

A. L. REEVES,

Counsel for Petitioner.

INDEX TO APPENDIX

(Chronologically arranged)

	Appendix Page, both numerals inclusive
OREGON 1909 WATER CODE	I-XXXIII
Sec. 1 Rights by appropriation subject to existing rights.	I
Secs. 2-10 Creates "Water Divisions"—superintendents thereof—who, with State Engineer, compose Board of Control—defines duties.	I-IV
Secs. 11-36 Providing for the initiation and conduct of adjudication proceedings before the board and the courts.	IV-XV
Secs. 36-44 Water-masters.	XV-XVIII
Secs. 45-54 Procedure for appropriation of water.	XVIII-XXIII
Secs. 55-69 Regulation – inspection – reservoirs – injunctions – penalties for violations – money appropriated to carry into effect.	XXIII-XXIX
Sec. 70 Vested rights preserved–includes eight subdivisions – subdivision 2 thereof said to define vested riparian rights	XXIX-XXXI XXIX-XXX
Sec. 72 Eminent Domain.	XXXII
Sec. 74 Emergency Clause (End of Act).	XXXIII

Appendix Page, both numerals inclusive

POLICE POWER—EMERGENCY CLAUSE ..... XXXIII-XXXV

Oregon Constitutional Referendum Amendment XXXIV

THE KADDERLY CASE, (44 Or. 118; 74 Pac. 710, 75 Pac. 222) ..... XXXV-XXXVIII
Construing referendum amendment—quotation.

CAMERON V. STEVENS, (121 Or. 538; 256 Pac. 395) ..... XXXVIII-XXXIX
On the referendum clause.

COLORADO ..... XXXIX-XL
Its referendum provision and decisions thereunder.

ARIZONA AND OHIO XL

COMMON LAW—STATES DETERMINE FOR THEMSELVES WHETHER THEY ADOPT COMMON LAW RIPARIAN DOCTRINE XL
Citing *Kansas v. Colorado*, 206 U. S., 46-118; 51 L. Ed. 956.

THE COMMON LAW ADOPTED ON ADMISSION OF OREGON ..... XLI-XLIII

THE COMMON LAW DOCTRINE OF RIPARIAN RIGHTS AS ANNOUNCED BY THIS COURT XLIII
Citing *U. S. v. Rio Grande Dam & I. Co.*, 174 U. S. 690; at 43 L. Ed. 1141.

STURR V. BECK, (133 U. S. 541-552; 33 L. Ed. 761) ..... XLIV-XLVI

FAULL V. COOK, 19 Or. 455; 26 Pac. 662) XLVI

BAKER V. BROWN, (39 Or. 66; 65 Pac. 799; 66 Pac. 193) XLVII

Appendix Page, both numerals inclusive

ADDITIONAL CASES SHOWING APPLICATION OF COMMON LAW DOCTRINE 1899 to 1912 ..... XLVII-XLVIII

HOUGH V. PORTER (51 Or. 318; 95 Pac. 732, 98 Pac. 1083) ..... XLVIII-L
Subdivision 28, at page 404.

THE DESERT LAND ACT, (Title 43, U. S. C. R., Secs. 321-2-3-4) ..... XLVIII-L

DECISIONS SUBSEQUENT TO THE ENACTMENT OF THE WATER CODE L-LIV
There are there cited:
In re Willow Creek, 74 Or. 593; 144 Pac. 505; 146 Pac. 475 L
The Norwood Case, 112 Or. 106; 227 Pac. 1111 LII

OREGON LEGISLATIVE RECOGNITION OF RIPARIAN RIGHTS ARISING FROM THE LOCATION OF RIPARIAN LANDS ALONG THE STREAMS ..... LIV-LIX
Session Laws of 1891 LIV
Session Laws of 1895 LV
Session Laws of 1899 LVI
Session Laws of 1903, amending that of 1899 LVII
Session Laws of 1901 LVIII
Session Laws of 1905 ..... LVIII-LIX

APPENDIX

GENERAL LAWS OF OREGON
1 9 0 9
WATER CODE
Chapter 216.

AN ACT

Providing a system for the regulation, control, distribution, use, and right to the use of water, and for the determination of existing rights thereto within the State of Oregon, providing penalties for its violation and appropriating money for the maintenance thereof, and declaring an emergency.

Be It Enacted by the Legislative Assembly of the State of Oregon:

Be It Enacted by the People of the State of Oregon:

Section 1. Subject to existing rights, all waters within the State may be appropriated for beneficial use, as herein provided, and not otherwise; but nothing herein contained shall be so construed as to take away or impair the vested right of any person, firm, or corporation, or association, to any water.

Section 2. Water Divisions.—The State of Oregon is hereby divided into two water divisions, as follows:

Water Division No. 1 shall consisit of all the lands embraced within the following counties, to-wit: Benton, Clackamas, Columbia, Clatsop, Coos, Curry, Douglas, Josephine, Jackson, Klamath, Lake, Lane, Linn, Lincoln, Marion, Polk, Multnomah, Tillamook, Yamhill and Washington.

Water Division No. 2 shall consist of all the lands embraced within the remaining counties of the State.

Section 3. Division Superintendents, Appointments and Term of.—There shall be one superintendent for each water division, who shall, immediately after this act becomes effective, be appointed by the governor to serve until January 1, 1911, or until his successor is appointed or elected and shall have qualified, and who shall be a resident of the water division for which he is appointed. At the general election in 1910, and every

four years thereafter, there shall be elected by the voters of the counties of the first and second water divisions of the State a division superintendent, each of whom shall hold office for the term of four years, or until his successor is elected and qualified. Each of said water superintendents shall have knowledge and experience relative to the irrigation law and its administration, and measurement of flowing water, evaporation, seepage, and common alkalies, drainage and hydrographic features of the water division in which the candidate may reside.

Section 4. Duties.—Said division superintendent shall have general control over the water masters of the several districts within his division. He shall execute the laws relative to the distribution of water, and perform such other functions as may be assigned to him. He shall have authority to make such reasonable regulations to secure the equal and fair distribution of water in accordance with the determined rights as may be needed in his division. Such regulations shall not be inconsistent with the laws of the State.

Section 5. Appeal From.—Any person, association, or corporation who may deem himself, or, itself aggrieved by any such order or regulation of such division superintendent shall have the right to appeal from the same to the Board of Control by filing with it a copy of the order or regulation complained of and a statement of the manner in which the same injuriously affects the petitioner's interest. The board shall, after due notice, hear whatever testimony may be adduced by the petitioner, either orally or by affidavit, and shall have the power to suspend, amend or confirm the order complained of.

Section 6. Water Division Superintendent and Compensation Of.—Each division superintendent shall receive a salary of two thousand four hundred dollars per annum, in full compensation for all his services, and shall in addition thereto be paid his actual traveling expenses when called away from home in the performance of his duties. Such salary and expenses

shall be paid at the same time and in the same manner as those of other State officers. Such division superintendents shall not engage in any other business.

Section 7. Oath and Bond.—Before entering upon the duties of his office, each division superintendent shall take and subscribe an oath faithfully to perform the duties of his office, and file with the Secretary of State said oath and his official bond in the penal sum of five thousand dollars, with surety, or sureties, to be approved by the Governor, and conditioned for the faithful discharge of the duties of his office.

Section 8. State Engineer.—As soon as possible after this act shall become effective a State Engineer, technically qualified and experienced as an hydraulic engineer, shall be appointed by the Governor. He shall hold his office until January 1, 1911, unless sooner removed by the Governor for cause, and until his successor shall have been elected and shall have qualified. At the general election held in November, 1910, and every four years thereafter, there shall be elected a State Engineer by the voters of the State, whose term of office shall be four years, and until his successor is elected and qualified. He shall receive a salary of $2400.00 per annum and actual necessary traveling expenses while away from his office in the discharge of official duties, payable as other State officers are paid. He shall perform such duties as are prescribed by law, and may employ assistants and purchase materials and supplies necessary for the proper conduct and maintenance of his department in pursuance of appropriations as made from time to time for such purposes.

Section 9. Board of Control.—The State Engineer and the superintendents of the two water divisions shall constitute a Board of Control, which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the State, and of their appropriation, distribution, and diversion, and of the various officers connected therewith. The decisions of said board shall be subject to appeal to the circuit and

supreme courts, which appeal shall be governed by the practice in suits in equity, unless otherwise provided herein. Said board shall have an office in the Capitol at Salem, and shall hold two regular meetings each year for the transaction of such business as may come before it, the first of said meetings to begin on the second Wednesday in April and the second on the third Wednesday in November. The State Engineer shall be ex-officio president of said board, and shall have a right to vote on all questions coming before it. A majority of said board shall constitute a quorum to transact business. The board shall have power to adjourn meetings from time to time, and to meet in special session at the call of the president, or of any two members. Notice of any special meeting must be given by registered mail to each member three days before the date thereof, but such meeting may be held at any time when all members of the board are present.

Section 10. Secretary and Other Assistants; Salary. —The Board of Control shall have authority, with power of removal, to appoint a secretary, who shall receive a salary of twelve hundred dollars per annum. He may be required by the board to furnish such bond as it may deem necessary, for the faithful performance of his duties. The duties of the secretary shall consist in keeping a full, true, and complete record of the transactions of the Board of Control, and he shall certify, under seal, all water right certificates made according to law. He shall perform such other duties as may be imposed by law or required of him by the board. Said board shall also have the power to employ such other assistants and purchase materials and supplies as may be necessary for the proper conduct of its business.

Section 11. Determination.—Upon a petition to the Board of Control, signed by one or more water users upon any stream, requesting the determination of the relative rights of the various claimants to the waters of that stream, it shall be the duty of the Board of Control, if, upon investigation, they find the facts and conditions are such as to justify, to make a determin-

ation of the said rights, fixing a time for beginning the taking of testimony and the making of such examination as will enable them to determine the rights of the various claimants. In case suit is brought in the circuit court for the determination of rights to the use of water, the case may, in the discretion of the court, be transferred to the Board of Control for determination as in this act provided.

Section 12. Notice of Proceedings.—The board shall prepare a notice, setting forth the date when the engineer will begin an investigation of the flow of the stream and of the ditches diverting water therefrom, and a place and a time certain when the superintendent of the water division in which that stream is situated, shall begin the taking of testimony as to the rights of the parties claiming water therefrom. Said notice shall be published in two issues of one or more newspapers having general circulation in the counties in which such stream is situated, the last publication of said notice to be at least thirty days prior to the beginning of taking testimony by said division superintendent, or for the measurement of the stream by the State Engineer, or his assistant. The superintendent taking such testimony shall have the power to adjourn the taking of testimony from time to time and from place to place to suit the convenience of those interested.

Section 13. Notice to Claimants.—It shall be the duty of said division superintendent to send by registered mail to each person, firm or corporation, hereinafter to be designated as claimant, claiming the right to the use of any of the waters of said stream, and to each person, firm or corporation owning or being in possession of lands bordering on and having access to said stream or its tributaries, insofar as such claimants and owners and persons in possession can reasonably be ascertained, a similar notice setting forth the date when the State Engineer or his assistant will begin the examination of the stream and the ditches diverting the waters therefrom, and also the date when the superintendent will take testimony as

to the rights to the water of said stream. Said notice must be mailed at least thirty (30) days prior to the date set therein for making the examination of the stream or the taking of testimony.

Section 14. Statement of Claimant.—The division superintendent shall, in addition, inclose with said notice a blank form on which said claimant or owner shall present in writing all the particulars necessary for the determination of his right to the waters of the stream to which he lays claim, the said statement to include the following:

The name and postoffice address of the claimant.

The nature of the right or use on which the claim is based.

The time of initiation of such right or the commencement of such use, and if distributing works are required.

The date of beginning of construction.

The date when completed.

The date of beginning and completion of enlargements.

The dimensions of the ditch as originally constructed and as enlarged.

The date when water was first used for irrigation or other beneficial purposes, and if used for irrigation, the amount of land reclaimed the first year, the amount in subsequent years, with the dates of reclamation, and the amount and general location of the land such ditch is intended to irrigate.

The character of the soil and the kind of crops cultivated, and such other facts as will show a compliance with the law in acquiring the right.

Section 15. Statement To Be Under Oath.—Each claimant or owner shall be required to certify to his statements under oath, and the superintendent of the water division in which the testimony is taken is hereby authorized to administer such oaths, which shall be done without charge, as also shall be the furnishing of blank forms for said statement.

Section 16. Testimony Taken by Division Superin-

tendent.—Upon the date named in the notice provided for herein for the taking of testimony, the division superintendent shall begin the taking of such testimony and shall continue until completed. In case the division superintendent of any water division is directly or indirectly interested in the water of any stream of his division, or is prevented by illness or otherwise from the taking of such proofs, the taking of testimony so far as relates to said stream shall be under the direction of any other member of the Board of Control.

Section 17. Fees.—At the time of the submission of proof of appropriation, or at the time of the taking of testimony for the determination of rights to water, the division superintendent shall collect from each of the claimants or owners a fee of one dollar for the purpose of recording the water right certificate, when issued, in the office of the county clerk, together with the additional fee of fifteen cents for each acre of irrigated lands up to and including 100 acres, and five cents per acre for each acre in excess of 100 acres up to and including 1,000 acres, and one cent for each acre in excess of 1,000; also 25 cents for each theoretical horsepower up to and including 100 horsepower, and fifteen cents for each horsepower in excess of 100 up to and including 1,000 horsepower, and five cents for each horsepower in excess of 1,000 horsepower up to and including 2,000 horsepower, and two cents for each horsepower in excess of 2,000 horsepower, as set forth in such proof, the minimum fee, however, for any claimant or owner in such cases to be $2.50, also a fee of five dollars for any other character of claim to water. All fees collected by the division superintendent shall be accounted for at the following regular meeting of the Board of Control and paid by such board into the general fund of the State Treasury, except, however, those fees due, or to be paid to the county clerk. But in cases of appropriations of water made under a permit issued under the provisions of this act, only one dollar recording fee above provided shall be so collected by the division superintendent.

Section 18. Notice Upon Completion of Testimony.—

Upon the completion of the taking of testimony by the division superintendent, it shall be his duty at once to give notice by registered mail to the various claimants that at a time and place named in the notice not less than ten days thereafter, all of said evidence shall be open to inspection of the various claimants or owners, and said superintendent shall keep said evidence open to inspection at said places not less than ten days, and such other time as fixed in the notice. Said superintendent shall also state in said notice the county in which the determination of the Board of Control will be heard by the circuit court; provided, that said cause shall be heard in the county in which said stream or some part thereof is situate.

Section 19. Contests.—Should any person, corporation or persons owning any irrigation works, or claiming any interest in the stream or streams involved in the determination, desire to contest any of the rights of the persons, corporations or associations, who have submitted their evidence to the superintendent as aforesaid, such persons, corporations or associations, shall within five days after the expiration of the period as fixed in the notice for public inspection, notify the superintendent in writing, stating with reasonable certainty the grounds of their proposed contest, which statement shall be verified by the affidavit of the contestant, his agent or attorney, and the said division superintendent shall notify the said contestant and the person, corporation or association, whose rights are contested, to appear before him at such convenient place as the superintendent shall designate in said notice.

Section 20. Hearing.—Said superintendent shall also fix the time and place for the hearing of said contest, which date shall not be less than thirty nor more than sixty days from the date the notice is served on the party, association or corporation, which notice and returns thereof shall be made in the same manner as summons are served in civil actions in the circuit courts of this state. Superintendents of water divisions shall have power to adjourn hearings from time to

time upon reasonable notice to all the parties interested, and to issue subpoenas and compel the attendance of witnesses to testify upon such hearings, which shall be served in the same manner as subpoenas issued out of the circuit courts of the State, and shall have the power to compel such witnesses so subpoeanaed to testify and give evidence in said matter, and said witnesses shall receive fees as in civil cases, the costs to be taxed in the same manner as are costs in suits in equity. The evidence in such proceedings shall be confined to the subjects enumerated in the notice of contest.

Section 21. Contests; Deposit Required.—The superintendent shall require a deposit of five dollars from each party for each day he shall be so engaged in taking evidence of said contest. Upon the final determination of the matters by the Board of Control, an order shall be entered directing that the money so deposited shall be refunded to the persons, associations or corporations in whose favor such contest shall be determined, and that all moneys deposited by other parties therein shall be turned over by the superintendent to the Board of Control, who shall pay the same into the general fund of the State Treasury upon adjournment of each regular meeting of the board.

Section 22. Evidence Transmitted.—Upon the expiration of the period for which the evidence is kept open for inspection, the evidence in the original hearing before the superintendent, and the evidence taken in all contests, shall be transmitted by the superintendent to the office of the Board of Control in person, or by registered mail. Such evidence shall thereupon be filed with the board.

Section 23. Measurements of Streams and Ditches.—It shall be the duty of the State Engineer, or some qualified assistant, to proceed at the time specified in the notice to the parties on said stream to make an examination of said stream and the works diverting water therefrom, said examination to include the measurement of the discharge of said stream and of

the carrying capacity of the various ditches and canals, and examination of the irrigated lands; and an approximate measurement of the lands irrigated or susceptible of irrigation from the various ditches and canals; and to take such other steps and gather such other data and information as may be essential to the proper understanding of the relative rights of the parties interested; which said observation and measurement shall be reduced to writing and made a matter of record in his office, and it shall be the duty of the State Engineer to make or cause to be made a map or plat on a scale of not less than one inch to the mile, showing with substantial accuracy the course of said stream, the location of each ditch or canal diverting water therefrom, and the legal subdivisions of lands which have been irrigated or which are susceptible of irrigation from the ditches and canals already constructed.

Section 24. Order Determining Water Rights.—As soon as practicable after the compilation of said data, and the filing of said evidence, it shall be the duty of the Board of Control to make, and cause to be entered of record in its office, an order determining and establishing the several rights to the waters of said stream. As soon as practicable thereafter a certified copy of said determination shall be filed in the office of the county clerk of each county in which said stream, or any part thereof or any tributary, is situated, and the original evidence filed with the Board of Control shall be certified by the clerk of the board and, together with a certified copy of said determination, shall be filed with the clerk of the circuit court by which court such determination is to be heard. The determination of the board shall be in full force and effect from the date of its entry in the records of the board, unless and until its operation shall be stayed by a stay bond as provided for by this act. Upon the filing of the evidence with the circuit court of the county in which the determination is to be had, the board shall procure an order from said circuit court, or any judge thereof, fixing the time at which the determination shall be

heard in said court. Copies of this order, certified by the clerk of said court, shall be filed by the board as soon as practicable in the office of the county clerk of each county in which said determination is filed.

Section 25. Water Right Certificate.—Upon the final determination of the rights to the waters of any stream, it shall be the duty of the secretary of the Board of Control to issue to each person, association or corporation represented in such determination a certificate to be signed by the president of the Board of Control, and attested under seal by the secretary of said board, setting forth the name and postoffice address of the owner of the right; the priority of the date, extent and purpose of such right; and if such water be for irrigation purposes, a description of the legal subdivisions of land to which said water is appurtenant. Such certificate shall be transmitted by the president, or other member of the Board of Control, in person or by registered mail, to the county clerk of the county in which such right is located, and it shall be the duty of the county clerk upon receipt of the recording fee of one dollar collected as hereinbefore provided, to record the same in a book especially prepared and kept for that purpose, and thereupon immediately transmit the certificate to the respective owners.

Section 26. Court Procedure.—From and after the filing of the evidence and order of determination in the circuit court, the proceedings shall be as nearly as may be like those in a suit in equity, except that any proceedings, including the entry of a decree, may be had in vacation with the same force and effect as in term time. Within thirty days from the filing of such evidence and order in the circuit court, or within such further time as the court may for good cause allow, any party may file exceptions to the determination. If no exceptions shall be filed, the court shall on the day set for hearing enter a decree affirming the determination of the board.

All parties may be heard by counsel upon the consideration of the exceptions. The court may, if neces-

sary, remand the case for such further evidence to be taken by the superintendent of the water division as it may direct, and may require a further determination by the board. After the hearing, the court shall enter a decree affirming or modifying the order of the Board of Contr Upon the hearing, the court may assess and adjudge against any party such costs as it may deem just. Appeals may be taken to the supreme court from such decrees in the same manner and with the same effect as in other cases in equity, except that notice of appeal must be served and filed within sixty days from the entry of the decree.

Section 27. Clerk Shall Transmit Transcript to Clerk of Board.—The clerk of the circuit court, immediately upon the entry of any decree by the circuit court or by the judge thereof, shall transmit a certified copy of said decree to the secretary of the Board of Control. The secretary shall immediately enter the same upon the records of such office and the State Engineer shall forthwith issue to the superintendent or superintendents of water divisions instructions in compliance with the said decree, and in execution thereof.

Section 28. Distribution.—During the time the hearing of the order of the Board of Control is pending in the circuit court, and until a certified copy of the judgment, order or decree of the circuit court is transmitted to the Board of Control, the division of water from the stream involved in such appeal shall be made in accordance with the order of the board.

Section 29. Stay Bond.—At any time after the determination of the board has been entered of record, the operation thereof may be stayed in whole or in part by any party by filing a bond in the circuit court wherein such determination is pending in such amount as the judge thereof may prescribe, conditioned that such party will pay all damages that may accrue by reason of such determination not being enforced. Immediately upon the filing and approval of such bond, the clerk of the circuit court shall transmit to the Board of Control

a certified copy of such bond, which shall be recorded in the records by such board, and the State Engineer shall immediately give notice thereof to the superintendent of the proper water division.

Section 30. Rehearing.—Within six months from the date of the decree of the circuit court determining the rights upon any stream, or if appealed within six months from the decision of the supreme court, the Board of Control, or any party interested, may apply to the circuit court for a rehearing upon grounds to be stated in the application. Thereupon, if in the discretion of the court it shall appear that there are good grounds for the rehearing, the circuit court, or judge thereof, shall make an order fixing a time and place when such application shall be heard. The clerk of the circuit court shall, at the expense of the petitioner, forthwith mail written notice of said application to the Board of Control and to every party interested, and state in such notice the time and place when such application will be heard.

Section 31. Authorized to Administer Oaths.—The members of the Board of Control may administer oaths in the performance of their official duties.

Section 32. Fees.—The secretary of the Board of Control shall collect the following fees, which shall be paid in advance, and accounted for to the board, which fees shall be paid into the general fund of the State Treasury by such board at the adjournment of each regular meeting: for making transcripts of the records of the Board of Control or of papers or documents filed with said board, one dollar for the first folio and ten cents for each additional folio. For attaching certificate and seal of the board to each transcript, one dollar.

Section 33. Conclusive, When.—The determinations of the Board of Control as confirmed or modified as provided by this act in proceedings shall be conclusive as to all prior rights, and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the determination.

Section 34. Duty of Water Right Claimants.—Whenever proceedings shall be instituted for the determination of the rights to the use of any water, it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law; and any such claimant who shall fail to appear in such proceedings and submit proof of his claim shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in such proceedings, and shall be held to have forfeited all rights to the use of said water theretofore claimed by him. Any person, association or corporation interested in the water of any stream upon whom or which no service of notice shall have been had of the pendency of proceedings for the determination of the rights to the use of the water of said stream, and who or which shall have no actual knowledge or notice of the pendency of said proceedings may at any time prior to the expiration of one year after the entry of the determination of the board file a petition to intervene in said proceedings. Such petition shall contain, among other things, all matters required by this act, of claimants who have been duly served with notice of said proceedings and also a statement that the intervenor had no actual knowledge or notice of the pendency of said proceeding. Upon the filing of said petition in intervention, the petitioner shall be allowed to intervene upon such terms as may be equitable, and thereafter shall have all rights vouchsafed by this act to claimants who have been duly served.

Section 35. Proof Open to Inspection; Who May Contest.—Whenever the rights to the waters of any stream have been determined as herein provided, and it shall appear by the records of such determination that it had not been at one and the same proceeding, then in such case the Board of Control may open to public inspection, all proofs or evidence of rights to the water, and the findings of the board in relation thereto in the manner provided in Section 18; and any

persons, corporations, or associations who may desire to contest the claims or rights of other persons, corporations, or associations, as set forth in the proofs or established by the board, shall proceed in the manner provided for in Sections 19, 20 and 22; provided, that contests may not be entered into and shall not be maintained except between claimants who were not parties to the same adjudication proceedings in the original hearings.

WATER MASTERS.

Section 36. Districts.—The Board of Control shall divide each water division into water districts, and said water districts to be so constituted as to secure the best protection to the claimants for water and the most economical supervision on the part of the State; said water district shall not be created until a necessity therefor shall arise, but shall be created from time to time as the claims thereof from the streams of the State shall be determined.

Section 37. Water Master; How Appointed.—There shall be appointed by the Board of Control, one water master for each water district, who shall be a resident of the district he is appointed for and who shall have been a resident of said district for one year immediately prior to the date of his appointment, shall be selected from persons recommended by the superintendent of the water division in which such water district is situated. Each water master shall hold his office until his successor is elected and shall have qualified, and the Board of Control shall, by like selection and appointment, fill all vacancies which shall occur in the office of water master.

Section 38. Duty of Water Master.—It shall be the duty of the said water masters to divide the water of the natural streams or other sources of supply of his district among the several ditches and reservoirs, taking water therefrom, according to the rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut and fastened, the headgates of ditches, and shall regulate or cause to be regulated,

the controlling works of reservoirs, in time of scarcity of water, as may be necessary by reason of the rights existing from said streams of his district. The water master shall have authority to regulate the distribution of water among the various users under any partnership ditch or reservoir, where rights have been determined, in accordance with existing decrees. Whenever, in the pursuance of his duties, the water master regulates a headgate to a ditch or the controlling works of reservoirs, it shall be his duty to attach to such headgate or controlling works, a written notice properly dated and signed, setting forth the fact that such headgate or controlling works has been properly regulated and is wholly under his control, and such notice shall be a legal notice to all parties interested in the division and distribution of the water of such ditch or reservoir. It shall be the duty of the district attorney to appear for, or on behalf of the division superintendent or any water master in any case which may arise in the pursuance of the official duties of any such officer within the jurisdiction of said district attorney.

Section 39. Water Master Shall Prevent Waste.—Said water master shall, as near as may be, divide, regulate and control the use of the water of all streams within his district by such closing or partially closing of the headgates as will prevent the waste of water, or its use in excess of the volume to which the owner of the right is lawfully entitled, and any person who may be injured by the action of any water master, shall have the right to appeal to the circuit court for an injunction. Such injunction shall only be issued in case it can be shown at the hearing that the water master has failed to carry into effect the order of the board of control or decrees of the court determining the existing rights to the use of water.

Section 40. Pay of.—Each water master herein provided for shall receive compensation at the rate of $5.00 per day for each day he shall be actively employed in the duties of his office. Where the service may be improved by continuous employment and upon recommendation of the division superintendent and the

approval of the county court of the county, or counties, in which said district is located by an order, or orders, made at regular term, or terms, thereof when sitting for the transaction of county business he shall receive pay at the rate of $100.00 per month, in either case to be paid by the county in which the work is performed. Each water master shall keep a true and just account of time spent by him in the duties of each county, respectively, in which his duties may extend, and he shall present a true copy thereof, verified by oath, to the county court sitting for the transaction of county business of the county in which his work may be performed. And the county court shall, upon approval thereof by the superintendent of the water division, allow and pay the same. *Provided*, any water master may be suspended by an order of the county court of any county in which his district may lie in case said court shall find and enter an order to the effect that said water master is claiming more time than the public service requires, and during such suspension such water master shall receive no pay.

Section 41. Employment of Assistants.—Said water master shall have power, in cases of emergency, to employ suitable assistants to aid him in the discharge of his duties. Such assistants shall take the same oath as the water master, and shall obey his instructions, and each shall be entitled to such compensation as his services may demand and as the superintendent may recommend, not to exceed in any case, four dollars per day for each day he is employed, such payments to be made upon certificates of the division superintendent in the same manner as provided for the payment of the water master. The term of service of such assistant water master may be terminated at any time by the division superintendent, and shall in no event continue after the emergency has ceased to exist.

Section 42. Water Masters to Begin Work, When.—When arrangements are not made for employment of a water master at a monthly rate, as provided in Section 40 of this act, the said water master shall begin his work upon written demand being made upon

him therefor by one or more water users. Such written demand for his services shall be attached to his bill for services and forwarded with it to the county commissioners of the proper county. Where the said water master is employed by the month he shall begin work and terminate his services as the superintendent of his water division may direct. The division superintendent may, under any condition, call upon the water master for work within his district whenever the necessity therefor may in his judgment arise.

Section 43. Interference With Headgate; Penalty.—Any person who shall willfully open, close, change or interfere with any lawfully established headgate or water box without authority, or who shall willfully use water or conduct water into or through his ditch which has been lawfully denied him by the water master or other competent authority, shall be deemed guilty of a misdemeanor. The possession or use of water when the same shall have been lawfully denied by the water master or other competent authority shall be *prima facie* evidence of the guilt of the person using it.

Section 44. Power of Arrest.—The water master, or his assistants, within his district shall have power to arrest any person or persons violating any of the provisions of this act and turn them over to the sheriff or other competent police officer within the county; and immediately upon delivering any such person so arrested into the custody of the sheriff, it shall be the duty of the water master making such arrest to immediately, in writing and upon oath, make complaint before the proper justice of the peace against the person so arrested.

PROCEDURE RELATIVE TO THE APPROPRIATION OF WATER.

Section 45. Application.—Any person, association or corporation hereafter intending to acquire the right to the beneficial use of any waters shall, before commencing the construction, enlargement or extension of any ditch, canal or other distributing or controlling works, or performing any work in connection with

said construction, or proposed appropriation, make an application to the State Engineer for a permit to make such appropriation. Any person who shall willfully divert or use water to the detriment of others without compliance with law, shall be deemed guilty of a misdemeanor. The possession or use of water, except when a right of use is acquired in accordance with law, shall be *prima facie* evidence of the guilt of the person using it.

Section 46. Applications, Nature of.—Each application for permit to appropriate water shall set forth the name and postoffice address of the applicant, the source of water supply, the nature and amount of the proposed use, the location and description of the proposed ditch, canal, or other work, the time within which it is proposed to begin construction, the time required for completion of the construction, and the time for the complete application of the water to the proposed use. If for agricultural purposes, it shall give the legal subdivisions of the land and the acreage to be irrigated, as near as may be. If for power purposes, it shall give the nature of the works by means of which the power is to be developed, the head and amount of water to be utilized, and the uses to which the power is to be applied. If for the construction of a reservoir, it shall give the height of dam, the capacity of the reservoir, and the uses to be made of the impounded waters. If for municipal water supply, it shall give the present population to be served, and, as near as may be, the future requirements of the city. If for mining purposes, it shall give the nature of the mines to be served, the methods of supplying and utilizing the water. All applications shall be accompanied by such maps and drawings, in duplicate, and such other data as may hereafter be prescribed by the Board of Control, and such accompanying data shall be considered as a part of the application.

Section 47. Applications, Approval of.—Upon receipt of an application, it shall be the duty of the State Engineer to make an indorsement thereon of the date of its receipt and to keep a record of the same. If upon

examination the application is found to be defective, it shall be returned for correction or completion, and the date of, and reasons for the return thereof, shall be indorsed thereon and made a record in his office. No application shall lose its priority of filing on account of such defects, provided acceptable maps and drawings are filed in the office of the State Engineer within thirty days from the date of said return to the applicant. All applications which shall comply with the provisions of this act shall be recorded in a suitable book kept for that purpose, and it shall be the duty of the State Engineer to approve all applications made in proper form which contemplate the application of water to a beneficial use, but when the proposed use conflicts with determined rights, or is a menace to the safety and welfare of the public, the application shall be referred to the Board of Control for consideration. It shall be the duty of the board to enter an order directing the refusal of such application, if, after full hearing, the public interest demands. An application may be approved for a less amount of water than that applied for, if there exists substantial reasons therefor, and in any event shall not be approved for more water than can be applied to a beneficial use. Applications for municipal water supplies may be approved to the exclusion of all subsequent appropriations, if the exigencies of the case demand upon consideration and order by the Board of Control.

Section 48. Application, How Indorsed.—The approval or rejection of an application shall be indorsed thereon and a record made of such indorsement in the State Engineer's office. The application so indorsed shall be returned immediately to the applicant by mail. If approved, the applicant shall be authorized, on receipt thereof, to proceed with the construction of the necessary works, and to take all steps required to apply the water to a beneficial use, and to perfect the proposed appropriation. If the application is refused, the applicant shall take no steps toward the construction

of the proposed work or the diversion and use of water so long as such refusal shall continue in force.

Section 49. Assignment of Permit.—Any permit or license to appropriate water may be assigned, subject to the conditions of the permit, but no such assignment shall be binding, except upon the parties thereto, unless filed for record in the office of the State Engineer.

Section 50. Limitation on Time of Completing Work. —Actual construction work shall begin within one year from the date of approval of the application and the construction of any proposed irrigation or other work shall thereafter be prosecuted with reasonable diligence, and be completed within a reasonable time, as fixed in the permit, not to exceed five years from the date of such approval. The Board of Control shall, for good cause shown, extend the time within which irrigation or other works shall be completed, or the right perfected, under any permit which may be submitted for its consideration by the State Engineer.

Section 51. Appeals.—Any applicant may appeal to the Board of Control for relief, which board may modify the decisions of the State Engineer if it shall appear that he has abused the authority reposed in him by law. Such appeal shall be taken within 30 days from the date of such decision by the State Engineer, and shall be perfected when the applicant shall have filed in the office of the board a copy of the order appealed from, together with a petition setting forth the appellant's reason for appeal, and such appeal shall be heard and determined upon such competent proof as shall be adduced by the applicant, and such like proofs as shall be adduced by the State Engineer. The State Engineer shall not sit as a member of the board on such appeal.

Section 52. Fees.—The following fees shall be collected by the State Engineer in advance, and be paid by him into the general fund of the State Treasury on the last day of March, June, September and December of each year:

(a) For examining an applicant for permit to appropriate water, three dollars.

(b) For filing and recording permit to appropriate water for irrigation purposes, fifteen cents per acre for each acre to be irrigated up to and including one hundred acres, and five cents per acre for each acre in excess of one hundred and up to and including one thousand acres; and one cent per acre for each acre in excess of one thousand acres, or in case the application is for power purposes, twenty-five cents for each theoretical horsepower to be developed up to and including one hundred, and ten cents for each horsepower in excess of one hundred and up to and including one thousand, and five cents for each horsepower in excess of one thousand; or, in case the application is for any other purpose, including applications by municipalities for power purposes, five dollars for filing and recording each permit.

(c) For filing or recording any other water right instrument, one dollar for the first hundred words and ten cents for each additional hundred words or fraction thereof.

(d) For making copy of any document recorded or filed in his office, ten cents for each hundred words or fraction thereof; but where the amount exceeds $5.00, then only the actual cost in excess of that amount shall be charged.

(e) For certifying to copies, documents, records, or maps, one dollar for each certificate.

(f) For blue print copy of any map or drawing, ten cents per square foot or fraction thereof. For such other work as may be required of his office, actual cost of the work.

Section 53. Water Right Certificate.—Upon it being made to appear to the satisfaction of the Board of Control that any appropriation has been perfected in accordance with the provisions of this act, it shall be the duty of the Board of Control to issue to the applicant a certificate of the same character as that described in Section 25. Said certificate shall be recorded and transmitted to the applicant as provided

in said section. Certificates issued for rights to the use of water for power development acquired under the provisions of this act shall limit the right or franchise to a period of forty years from date of application, subject to a preference right of renewal under the laws existing at the date of expiration of such franchise or right.

Section 54. Date of Right.—The right acquired by such appropriation shall date from the filing of the application in the office of the State Engineer.

Section 55. Headgate, Maintenance of.—The owner or owners of any ditch or canal shall maintain, to the satisfaction of the division superintendent of the division in which the irrigation works are located, a substantial headgate at the point where the water is diverted, which shall be of such construction that it can be locked and kept closed by the water master; and such owners shall construct and maintain when required by the division superintendent, suitable measuring devices at such points along such ditch as may be necessary for the purpose of assisting the water master in determining the amount of water that is to be diverted into said ditch from the stream, or taken from it by the various users. Any and every owner or manager of a reservoir, located across or upon the bed of a natural stream, shall be required to construct and maintain, when required by the division superintendent, a measuring device of a plan to be approved by the State Engineer, below such reservoir, and a measuring device above such reservoir on each or every stream or source of supply discharging into such reservoir, for the purpose of assisting the water master or superintendent in determining the amount of water to which appropriators are entitled and thereafter diverting it for such appropriators' use. When it may be necessary for the protection of other water users, the division superintendent may require flumes to be installed along the line of any ditch. If any such owner or owners of irrigation works shall refuse or neglect to construct and put in such headgates, flumes or measuring devices after ten days' notice, the division

superintendent may close such ditch, and the same shall not be opened or any water diverted from the source of supply, under the penalties prescribed by law for the opening of headgates lawfully closed, until the requirements of the division superintendent as to such headgate, flumes or measuring device have been complied with, and if any owner or manager of a reservoir located across the bed of a natural stream shall neglect or refuse to put in such measuring device after ten days' notice by the division superintendent, such superintendent may open the sluice gate or outlet of such reservoir and the same shall not be closed under penalties of the law for changing or interfering with headgates, until the requirements of the division superintendent as to such measuring devices are complied with.

Section 56. Engineer's Authority to Inspect.—The State Engineer shall have authority to examine and inspect, during construction, any dam, authorized under the provisions of this chapter, or any ditch, canal or other work, and at the time of such inspection, or thereafter, he shall notify the parties constructing such dam, or other works, of any addition or alteration which he considers necessary for the security of the work or the safety of any person or persons residing on or owning land in the vicinity of such works, or for the safety of their property.

Section 57. Inspection; When Required.—Should any person or persons residing on or owning land in the neighborhood of any irrigation works after completion, or in course of construction, apply to the State Engineer in writing desiring an inspection of such works, the State Engineer may order an inspection thereof. Before doing so he may require the applicant for such inspection to make a deposit of a sum of money sufficient to pay the expenses of an inspection, and in case the application appears to him not to have been justified, he may cause the whole or part of such expenses to be paid out of such deposit. In case the application appears to the State Engineer to have been justified, he may require the owner of the works to

pay the whole or any part of the expenses of the inspection, and the same shall constitute a valid lien against the works, which may be enforced in the same manner as provided for the enforcement of mechanics' liens.

RESERVOIRS.

Section 58. Procedure Under Reservoir Permit.—All applications for reservoir permits shall be subject to the provisions of Sections 45 to 51, both inclusive, except that an enumeration of any lands proposed to be irrigated under this act shall not be required in the primary permit. But the party or parties proposing to apply to a beneficial use the water stored in any such reservoir shall file an application for permit, to be known herein as the secondary permit, in compliance with the provisions of Sections 45 to 51, both inclusive. Said application shall refer to such reservoir for a supply of water and shall show by documentary evidence that an agreement has been entered into with the owners of the reservoir for a permanent and sufficient interest in said reservoir to impound enough water for the purposes set forth in said application. When beneficial use has been completed and perfected under the secondary permit, the division superintendent shall take the proof of the water user under such permit and the final certificate of appropriation shall refer to both the ditch described in the secondary permit and the reservoir described in the primary permit.

Section 59. Duty of Water Master and Costs; l w Payable.—Whenever the owner, manager or lessee of a reservoir, constructed under the provisions of this act shall desire to use the bed of a stream, or other water-course, for the purpose of carrying stored or impounded water from the reservoir to the consumer thereof, he shall, in writing, notify the water master of the district, in which the stored or impounded water is to be used, giving the date when it is proposed to discharge water from such reservoir, its volume, and the names of all persons and ditches entitled to its use. It shall then be the duty of such water master to close,

or so adjust the headgates of all ditches from the stream or watercourse, not entitled to the use of such stored water, as will enable those having the right to secure the volume to which they are entitled. The water master shall keep a true and just account of the time spent by him in the discharge of his duties as defined in this section, and it shall be the duty of the county commissioners of the county wherein the expense is incurred, to present a bill of one-half the expense so incurred to the reservoir owner, manager or lessee, and if such owner, manager or lessee shall neglect for thirty days, after the presentation of such bill of costs, to pay the same, the said costs shall be made a charge upon said reservoir and shall be collected as delinquent taxes until the complete payment of such bill of costs has been made.

Section 60. Attorney-General and District Attorneys Advisors of State Engineer.—The Attorney-General and the district or prosecuting attorney of the county in which legal questions arise, shall be the legal advisors of the State Engineer and of the Board of Control, and shall perform any and all legal duties necessary in connection with their work, without other compensation than their salaries as fixed by law.

Section 61. Joint Owners; Responsibility.—In all cases where ditches are owned by two or more persons and one of more of such persons shall fail or neglect to do a proportionate share of the work necessary for the proper maintenance and operation of such ditch or ditches or to construct suitable headgates or measuring devices at the points where water is diverted from the main ditch, such owner or owners desiring the performance of such work may, after having given ten days' written notice to such other owner or owners, who have failed to perform such proportionate share of the work, necessary for the operation and maintenance of said ditch or ditches, perform such share of the work, and recover therefor from such person or persons in default the reasonable expense of such work.

Section 62. Lien for Work Performed on Ditch.—Upon the failure of any co-owner to pay his propor-

tionate share of such expense, as mentioned in the preceding section, within thirty days after receiving a statement of the same as performed by his co-owner or owners, such person or persons so performing such labor may secure payment of said claim by filing an itemized and sworn statement thereof, setting forth the date of the performance and the nature of the labor so performed, with the county clerk of the county wherein said ditch is situated, and when so filed it shall constitute a valid lien against the interest of such person or persons in default, which said lien may be established and enforced in the same manner as provided by law for the enforcement of mechanics' liens.

Section 63. Regulation of Partnership Ditches and Reservoirs.—When two or more persons, joint owners in an irrigation ditch or reservoir, not incorporated, or their lessees, are unable to agree relative to the division or distribution of water received through their ditch or from their reservoir, it shall be lawful for any such owner or owners, his or their lessee or lessees, or either of them, to apply to the water master of the district in which such ditch or reservoir shall be located, by a written notice setting forth such fact, asking the water master to take charge of such ditch or reservoir for the purpose of making a just division or distribution of the water from the same, to the parties entitled to the use thereof. The said water master shall take exclusive charge of such ditch or reservoir for the purpose of dividing the water therefrom in accordance with established rights, and continuing the said work until the necessity therefor shall cease to exist. In all cases where the water master or an assistant water master is called upon to divide the waters of a ditch or reservoir between appropriators, he shall be paid in full for his services by the interested water users in proportion to the established rights of each, and shall have a lien upon any land irrigated by the water owned by an interested water user refusing to pay, said lien to be established and enforced in the same manner as a mechanics' lien.

Section 64. Injunctions.—In suits for injunction

affecting the use of water from streams upon which the rights to water have been determined, no restraining order shall be granted before hearing had after at least three days' notice thereof, served upon all persons defendant. All suits for injunction involving the use of water shall be heard, either in term time or during vacation, not later than fifteen days after issues joined, unless for good cause shown further time be allowed.

Section 65. Water Appurtenant to Land for Irrigation Purposes.—All water used in this State for irrigation purposes shall remain appurtenant to the land upon which it is used; *provided*, that if for any reason it should be at any time become impracticable to beneficially or economically use water for the irrigation of any land to which the water is appurtenant, said right may be severed from said land, and simultaneously transferred, and become appurtenant to other land, without losing priority of right theretofore established, if such change can be made without detriment to existing rights, on the approval of an application of the owner to the Board of Control. Before the approval of such transfer an inspection shall be made by the proper division superintendent, who shall submit his report to the Board of Control, whereupon, by order, the board shall approve or disapprove such transfer and prescribe the conditions therefor. Such order shall be subject to appeal as in this act provided.

Section 66. Unlawful Use of Water and Waste.—The unauthorized use of water to which another person is entitled, or the willful waste of water to the detriment of another, shall be a misdemeanor, and the possession or use of such water without legal right, shall be *prima facie* evidence of the guilt of the person using it. It shall also be a misdemeanor to use, store, or divert any water until after the issuance of permit to appropriate such waters.

Section 67. Obstructing Works.—Whenever any appropriator of water has the lawful right of way for the storage, diversion, or carriage of water, it shall

be unlawful to place or maintain any obstruction that shall interfere with the use of the works, or prevent convenient access thereto. Any violation of the provisions of this section shall be a misdemeanor.

Section 68. Penalty for Misdemeanors Under This Act.—All violations of the provisions of this act, declared herein to be misdemeanor, shall be punished by a fine not exceeding two hundred and fifty dollars nor less than ten dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

Section 69. Appropriations.—There is hereby appropriated out of any moneys in the general fund of the State Treasury not otherwise appropriated the sum of $10,000 annually, or so much thereof as may be necessary for the payment of the salaries and expenses incurred by the Board of Control under the provisions of this act.

There is hereby appropriated out of any moneys in the general fund of the State Treasury not otherwise appropriated the sum of $5,000 annually, or so much thereof as may be necessary for the salary and expenses of the State Engineer, and the services of assistants, and expenses of the office and department of the State Engineer, which appropriation is in addition to the $5,000 annual appropriation heretofore made in Chapter 228, Session Laws of 1905.

All salaries and expenses incurred, and material and supplies furnished under the provisions of this act shall be paid at the same time and in the same manner as those of other officers of the State.

Section 70. Vested Rights Preserved.—

1. Nothing in this act contained shall impair the vested right of any person, association or corporation to the use of water.

2. Actual application of water to beneficial use prior to the passage of this act by or under authority of any riparian proprietor, or by or under authority of his or its predecessors in interest, shall be deemed to create in such riparian proprietor a vested right to the extent of the actual application to beneficial use;

provided, such use has not been abandoned for a continuous period of two years.

3. And where any riparian proprietor, or under authority of any riparian proprietor or his or its predecessor in interest, any person or corporation shall, at the time this act is filed in the office of the Secretary of State, be engaged in good faith in the construction of works for the application of water to a beneficial use, the right to take and use such water shall be deemed vested in such riparian proprietor; provided, such works shall be completed and said water devoted to a beneficial use within a reasonable time after the passage of this act. The Board of Control, in the manner hereinafter provided, shall have power and authority to determine the time within which such water shall be devoted to a beneficial use. The right to water shall be limited to the quantity actually applied to a beneficial use within the time so fixed by the Board of Control.

4. Nor shall anything in this act contained affect relative priorities to the use of water between or among parties to any decree of the courts rendered in causes determined or pending prior to the taking effect of this act.

5. Nor shall the right of any person, association or corporation, to take and use water be impaired or affected by any of the provisions of this act where appropriations have been initiated prior to the filing of this act in the office of the Secretary of State, and such appropriators, their heirs, successors or assigns, shall, in good faith and in compliance with laws existing at the time of filing this act in the office of the Secretary of State, commence the construction of works for the application of the water so appropriated to a beneficial use, and thereafter prosecute such work diligently and continuously to completion, but all such rights shall be adjudicated in the manner provided in this act.

6. The Board of Control shall have authority, and shall for good cause, shown upon the application of any appropriator, or user of water under an appropriation of water made prior to the passage of this

act, or in the cases mentioned in subdivisions 3 and 5 of this section, where actual construction work has been commenced prior to said time or within the time provided in law existing at the time of filing this act in the office of the Secretary of State, to prescribe the time within which the full amount of the water appropriated shall be applied to a beneficial use, and in determining said time shall grant a reasonable time after the construction of the works, or canal, or ditch, used for the diversion of the water, and in doing so shall take into consideration the cost of the appropriation and application of such water to a beneficial purpose, the good faith of the appropriator, the market for water or power to be supplied, the present demands therefor, and the income or use that may be required to provide fair and reasonable returns upon the investment. Upon making such order the Board of Control shall direct the State Engineer to issue a certificate showing such determination. For good cause shown the Board of Control may extend the time by granting further certificates.

7. And where appropriations of water heretofore attempted have been undertaken in good faith, and the work of construction or improvement thereunder has been in good faith commenced and diligently prosecuted, such appropriations shall not be set aside or avoided, in procedings under this act, because of any irregularity or insufficiency of the notice by law, or in the manner of posting, recording, or publication thereof.

8. All rights granted or declared by this act shall be adjudicated and determined in the manner and by the tribunals as provided in this act. This act shall not be held to bestow upon any person, association, or corporation, any riparian rights where no such rights existed prior to the time this act takes effect.

Section 71. Portland Water Supply.—The exclusive right to the use of the waters of Bull Run and Little Sandy rivers is hereby granted to the city of Portland, and all rights to the waters of the lakes, rivers and streams of this State heretofore acquired for the purposes of municipal water supply are hereby confirmed,

and no rights which shall be acquired under this act shall impair the rights of any municipal corporation to waters heretofore taken. The Board of Control shall reject, or grant, subject to municipal use, all applications where, in its judgment, the appropriation of the waters applied for impair a municipal water supply. It shall be the duty of municipal corporations of the State, on request of the State Engineer, to furnish to him a statement of the amount and source of the municipal water supply, with probable increase or extension of the same; provided, that this act shall not be deemed or held to and shall not impair the rights of any person, association or corporation who may, at and prior to the time this act is filed in the office of the Secretary of State, have any vested right to or valid appropriation or bona fide notice of appropriation of the waters of either the Bull Run or the Little Sandy river, under laws heretofore in effect or under any valid contract or deed of conveyance heretofore made with or by the city of Portland.

Section 72. Eminent Domain.—The United States, the State, or any person, foreign or domestic corporation or association, may exercise the right of eminent domain to acquire for a public use any property or rights now or hereafter existing when found necessary for the application of water to beneficial uses, including the right to enlarge existing structures and use the same in common with the former owner. Any right of way so acquired shall be so located as to do the least damage to private or public property, consistent with proper and economical engineering construction. Such property or rights may be acquired in the manner provided by law for the taking of private property for public use.

The right to conduct water from or over the land of another for any public use, including the right to raise any water by means of dams, reservoirs or embankments to a sufficient height to make the same available for the use intended, and the right to any and all land necessary therefor, may be acquired upon payment of just compensation in the manner provided

by law for the taking of private property for public use.

Section 73. Repeal.—All laws and parts of laws so far as in conflict or inconsistent with the provisions of this act are hereby repealed.

Section 74. Emergency.—WHEREAS, there is great uncertainty existing throughout the State with reference to the water rights of various parties along the streams, ditches and waterways as to their several interests therein, entailing expensive litigation and engendering many animosities and much bad blood, thereby endangering the public peace and safety of many sections of the State, and WHEREAS, it is urgent that these conditions be remedied for the preservation of the public peace, health and safety of the State, this act shall be in full force and effect from and after its approval by the Governor.

Filed in the office of the Secretary of State February 24, 1909.

POLICE POWER—EMERGENCY CLAUSE

The Emergency clause attached to the foregoing Water Code of 1909, Section 74, thereof, is cited in the majority opinion (page 21 of the Opinion) as establishing that said Water Code purported to be exercise of the police power of the state. The language of the Opinion is:

> "The Oregon Code of 1909 itself purported to be an exercise of the police power of the State, as shown by Section 74. Emergency."

At the time of the passage of the Act, the emergency clause was used to prevent laws being referred to the people under what the Oregon Constitution calls the "*Referendym.*" That was practically the sole use of the emergency clause of the Act, cited at the bottom of

page 21 of the majority opinion, and in this appendix at xxxiii.

In fact Colorado, Arizona, Ohio, and other states which borrowed from Oregon the referendum provision of its constitution, followed the doctrine of the Supreme Court of Oregon as announced in the *Kadderly* case, cited below.

OREGON REFERENDUM AMENDMENT

The initiative and referendum amendment to the Oregon Constitution is an amendment of Article IV and follows: (June 2nd, 1902).

Oregon Code Annotated, official edition 1930, Volume 1, page 96.

"ARTICLE IV.

LEGISLATIVE DEPARTMENT.

§ 1. Legislative authority—Style of bill—Initiative and referendum. The legislative authority of the state shall be vested in a legislative assembly consisting of a senate and house of representatives, but the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than eight per cent of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon. *The second power is the referendum, and it may be ordered (except as to laws necessary for the immedi-*

ate preservation of the public peace, health, or safety), either by the petition signed by five per cent of the legal voters, or by the legislative assembly, as other bills are enacted. Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded * * *.

Section 28 of Article IV of the Oregon Constitution, said Volume 1, Oregon Code, page 120, reads:

"§ 28. When act to take effect.—No act shall take effect until ninety days from the end of the session at which the same shall have been passed, except in case of emergency; which emergency shall be declared in the preamble or in the body of the law."

THE KADDERLY CASE

The use of the emergency clause is not a legislative declaration that the act is the exercise of the state police power.

The following quotations from the Kadderly case, and those citing it follow:

Kadderly v. Portland, 44 Or. 118 *(Dec. 1903)*, (74 Pac. 710, 75 Pac. 222).

Quotation from Point 10, pages 146 to 151, inclusive, of the Oregon Report:

"10. This brings us to the question as to whether the legislative declaration that the Portland charter was necessary for the preservation of the public peace, health, and safety is conclusive on the courts. Under the initiative and referendum amendment, laws 'necessary for the immediate

preservation of the public peace, health, or safety' are excepted from its operation. *As to them, the action of the legislative and executive departments is conclusive and final, so far as their enactment is concerned. No power is reserved to the people to approve or disapprove them.* They are not subject to the referendum amendment, and as to them the powers of the other departments of the government derived from the constitution are unaffected. The legislative assembly may, in its discretion, put them into operation through an emergency clause, as provided in the Constitution of Oregon, Article IV, § 28, or it may allow them to become laws without an emergency clause, the necessity or expediency of either course being a matter for its exclusive determination. As to all other laws the amendment applies, and they cannot be made to go into operation for 90 days after the adjournment of the session at which they were adopted, or until after approval by the people if the referendum is invoked. The Constitution of Oregon, Article IV, § 28, giving the legislative assembly power to put any law into force upon approval by declaring an emergency, has been modified by the amendment of 1902, so as to exclude from the power to declare an emergency all laws except those necessary for the immediate preservation of the public peace, health, or safety. So far, all are agreed. But the vital question is, what tribunal is to determine whether a law does or does not fall under this classification? Are the judgment and findings of the legislative assembly conclusive, or are they subject to review by the courts? *The inquiry is much simplified by bearing in mind that the exception in the constitutional amendment is not confined to such laws as the legislative assembly may legally enact by virtue of the police powers of the State, or to those alone that may affect the public peace, health, or safety. The police power is limited to the imposition of restraints and burdens on persons and property, in order to secure the general comfort, health, and*

prosperity of the state: Tiedeman, Lim. Pol. Power, § 1. But the language of the constitutional amendment is broader, and includes all laws, of whatsoever kind, necessary for the immediate preservation of the public peace, health, or safety, whether they impose restraints on persons and property, or come strictly within the police powers, or not. The laws excepted from the operation of the amendment do not depend alone *upon their character,* but upon the necessity for their enactment in order to accomplish certain purposes. *As to such laws the amendment of 1902 does not in any way abridge or restrict the power of the legislature, which, by the insertion of a proper emergency clause, may unquestionably cause them to go into effect upon approval by the Governor.* As the legislature may exercise this power when a measure is in fact necessary for the purposes stated, and as the amendment does not declare *what shall be deemed laws of the character indicated,* who is to decide whether a specific act may or may not be necessary for the purpose? Most unquestionably, those who make the laws are required, in the process of their enactment, to pass upon all questions of expediency and necessity connected therewith, and must therefore determine whether a given law is necessary for the preservation of the public peace, health, and safety.

It has always been the rule, and is now everywhere understood, that the judgment of the legislative and executive departments as to the wisdom, expediency, or necessity of any given law is conclusive on the courts, and cannot be reviewed or called in question by them. *It is the duty of the courts, after a law has been enacted, to determine in a proper proceeding whether it conflicts with the fundamental law, and to construe and interpret it so as to ascertain the rights of the parties litigant. The powers of the courts do not extend to the mere question of expediency,* or *necessity,* but, as said by Mr. Justice Brewer, 'they are wrought out and fought out in the legislature and before

the people. Here the single question is one of power. We make no laws. We change no constitutions. We inaugurate no policy. When the legislature enacts a law, the only question which we can decide is whether the limitations of the constitution have been infringed upon': Prohibitory Am. Cas. 24 Kan. 700, 706. The amendment excepts such laws as may be necessary for a certain purpose. The existence of such necessity is therefore a question of fact, and the authority to determine such fact must rest somewhere. The constitution does not confer it upon any tribunal. It must therefore necessarily reside with that department of the government which is called upon to exercise the power. It is a question of which the legislature alone must be the judge, and when it decides the fact to exist, its action is final: *Biggs v. McBride*, 17 Or. 640 (21 Pac. 878, 5 L. R. A. 115); *Umatilla Irrig. Co. v. Barnhart*, 22 Or. 389 (30 Pac. 37); *Gentile v. State*, 29 Ind. 409; *Wheeler v. Chubbuck*, 16 Ill. 361; *Sutherland*, Stat. Const. 108.

Cameron v. Stevens, 121 Or. 538 (1927), 256 Pac. 395.

Quotation from Oregon Report, 544-5:

"5-8. The effect of an emergency clause upon acts passed by the legislature is to cause the act to take effect at once upon its approval by the Governor and to *prevent its not going into effect* until after the expiration of the period otherwise prescribed by the Constitution. *What* may be deemed an emergency for this purpose is purely a legislative question. The courts will not inquire into it, nor entertain any question of its sufficiency: *1 Lewis' Sutherland on Statutory Const.* (2 ed.), § 176: Hence, it would *seem to follow that unless expressly prohibited by some constitutional provision, the legislature has as much power to prescribe when an act shall take effect as it has to*

enact the law itself, and that in order to make it take effect at once, it has the power to declare an emergency, and when so declared the act is not subject to the referendum powers of the people."

COLORADO

Shields et al v. City of Loveland et al, 74 Colo. 27 (July 2, 1923), 218 Pac. 913.

Quotation from the Pacific Reporter reference, page 915:

"*Article 5 of our Constitution is borrowed from Oregon almost literally,* and at the time of its adoption the Oregon courts had already held on this point in favor of the defendants in error, *Kadderly v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222, and later in *Thielke v. Albee*, 79 Or. 48, 153 Pac. 793, and so we held. See *Van Kleeck v. Ramer*, 62 Colo. 4, 156 Pac. 1108; *People v. Ramer*, 61 Colo. 422, 158 Pac. 146; *In re Senate Resolution*, 54 Colo. 262, 130 Pac. 333. So Ohio, *Shyrock v. Zanesville*, 92 Ohio St. 375, 110 N. E. 937."

In re Senate Resolution Number 4, Supreme Court of Colorado, (Feb. 28, 1913), 54 Colo. 262, 130 Pac. 333.

Quotation from Pacific Reporter reference, page 336, Point 3:

"(3) The next question is, Can the General Assembly lawfully prevent the proposed act from being *referred* by the declaration contained in section 6 thereof? To answer this, reference must again be had to the constitutional provision under consideration. It provides that the power reserved designated the 'Referendum' 'may be ordered, except as to laws necessary for the immediate preservation of the public peace, health or safety.' Whether a law is of this character is for the General Assembly to determine, and, when it so de-

termines, by a declaration to that effect in the body of a proposed act, we are of the opinion that *such declaration is conclusive upon all departments* of government, and all parties, in so far *as it abridges the right, to invoke* the referendum. Such a declaration is a part of the act, and may be passed by the majority required to pass any act, and is in no sense an emergency clause, as contemplated by Article 5, § 19."

To the same effect is

Van Kleeck v. Ramer, 62 Colo. 4, 156 Pac. 1108 (Apr. 3, 1916).

ARIZONA

Arizona has a similar referendum amendment, similarly construed. In its Supreme Court in defining the office of the emergency clause, with reference to its referendum, it cited with approval and followed the Oregon case of Kadderly vs. Portland, in

Orme v. Salt River Water Users' Association, 25 Ariz. 324, 217 Pac. 935 (1923).

OHIO

Ohio took its referendum provision from the Oregon Constitution, as stated in

State ex rel. Durbin v. Smith, 102 Ohio State, 591, 133 N. E. Rep. 457 (June 16, 1921).

It cited with approval and followed the Kadderly case, supra.

COMMON LAW

STATES DETERMINE FOR THEMSELVES WHETHER THEY ADOPT COMMON LAW RIPARIAN DOCTRINE.

Kansas v. Colorado, 206 U. S., pages 46-118, 27 Sup. Ct. 655, 51 L. Ed. 956.

We quote from 51 Law Ed. 973, which we believe to be page 94 of the U. S. Reports, as follows:

"It may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the *arid regions of the West* of the appropriation of waters for the *purposes of irrigation shall control.* Congress cannot enforce either rule upon any state. It is undoubtedly true that the *early settlers brought to this country the common law of England,* and that that common law throws light on the meaning and scope of the Constitution of the United States, and is also in many states expressly recognized as of controlling force in the absence of express statute. As said by Mr. Justice Grey in *United States v. Wong Kim Ark,* 169 U. S. 649, 654, 42 L. Ed. 890, 893, 18 Sup. Ct. Rep. 456, 459:

'In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. *Minor v. Happersett,* 21 Wall. 162, 22 L. Ed. 627; *Ex parte Wilson,* 114 U. S. 417, 422, 29 L. Ed. 89, 91, 5 Sup. Ct. Rep. 935; *Boyd v. United States,* 116 U. S. 616, 624, 625, 29 L. Ed. 746, 748, 749, 6 Sup. Ct. Rep. 524; *Smith v. Alabama,* 124 U. S. 465, 31 L. Ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564. The language of the Constitution, as has been well said, could not be understood without reference to the common law. I Kent. Com. 336; Bradley, J., in *Moore v. United States,* 91 U. S. 270, 274, 23 L. Ed. 346, 347'."

THE COMMON LAW ADOPTED ON ADMISSION OF OREGON

Speaking of common law in Oregon, Mr. Justice Gray in

Shively v. Bowlby, 152 U. S. 1, 52 (38 L. Ed. 331, 350),

said:

> "The settlers of Oregon, like the colonists of the Atlantic States, coming from a country in which the common law prevailed to one that had no organized goverment, took with them, as their birthright, the principles of the common law, so far as suited to their condition in their new home. The jurisprudence of Oregon, therefor, is based on the common law."

See also:

United States F. & G. Co. v. Bramwell, 108 Or., pages 261-289. *July 10, 1923* (217 Pac. 332).

Quotation from pages 264-266:

> "The common law of England, modified and amended by English statutes, as it existed at the time of the American Revolution, as far as it was general and not local in its nature and applicable to the conditions of the people and not incompatible with the nature of our political institutions or in conflict with the Constitution and laws of the United States or of this State, except as modified, changed or repealed by our own statutes, has been adopted and is in force in this state: *Perry v. Fletcher*, 93 Or. 43 (182 Pac. 143).
>
> By Section 2, Article I of the Organic Law of the provisional government of Oregon, adopted by the vote of the people on July 26, 1845, it was declared that:
>
> > 'The inhabitants of said territory shall always be entitled to the benefits of the writ of habeas corpus and trial by jury, of a proportionate representation of the people in the legislature, and of judicial proceedings, according to the course of common law.' * * * * * * * *
>
> "Section 7, Article XVIII of the Constitution, adopted by the people on September 18, 1857, pro-

vides that 'All laws in force in the territory of Oregon when this Constitution takes effect, and consistent therewith, shall continue in force until *altered or repealed*'."

In

Fidelity, etc., Co. v. State Bank of Portland, 117 Or. 1, 5. *January 19, 1926*, (242 Pac. 823),

Quotation from page 5:

"It is our understanding that we are as much bound by the applicable rules of the common law, where such rules have not been modified, or abrogated by statute, as we are by the statutes themselves."

THE COMMON LAW DOCTRINE OF RIPARIAN RIGHTS, AS ANNOUNCED IN THIS COURT, IS SET FORTH IN THE FOLLOWING CITATION:

U. S. v. Rio Grande Dam & I. Co., 174 U. S. 690, 19 Sup. Ct. 770, at 43 L. Ed. 1141;

"The unquestioned rule of the common law was that *every riparian owner* was entitled to the continued natural flow of the stream. It is enough, without other citations or quotations, to quote the language of Chancellor Kent (3 Kent, Sec. 439):

'Every proprietor of lands on the bank of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run *(currere solebat)* without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple *usufruct* while it passes

along. *Aqua currit et debet currere ut currere solebat* is the language of the law. Though he may use the water while it runs over his land *as an incident to the land* he cannot unreasonably detain it, or give it *another direction* and he must return it to its ordinary channel when it leaves his estate'."

Sturr, Appellant, v. Beck, 133 U. S. 541-552, 33 Law Ed. 761. (Decided March 3, 1890).

Quotation from Mr. Chief Justice Fuller, Law Ed. page 763-4-5:

"John Smith settled on the tract of land described in March, 1877, and continued to reside thereon until he sold and conveyed it by warranty deed to Beck, the appellee. He made his homestead filing or entry March 25, 1879, and his final proof May 10, 1883, and received a patent from the United States. The water of False Bottom Creek flowed in its natural channel over and across Smith's homestead, and in May, 1880, Sturr, the appellant, went upon that homestead, located a water right thereon and constructed a ditch which diverted the waters of the creek to his own adjacent land. Beck went into possession under the deed from Smith, and in 1886 notified Sturr to cease diverting the water and maintaining the ditch, and this suit thereupon followed.

It is not contended on behalf of Sturr that he is entitled to maintain the ditch because he constructed and used it, or that Smith's acquiescence amounted to anything more than a revocable license. There was no grant nor an adverse enjoyment so long continued as to raise a legal presumption of a grant. But it is insisted that the doctrine of prior appropriation of water on the public land and its beneficial use protects him from interference because neither Smith nor Beck made any water right location claiming the waters

of False Bottom Creek, and had never diverted those waters prior to Sturr's location.

If, however Smith obtained a vested right to have the creek flow in its natural channel by virtue of his homestead entry of *March 25, 1879*, and possession *thereunder*, or if *his patent* took effect as against Sturr by relation as of *that date*, then it is conceded that Sturr cannot prevail and the judgment must be affirmed.

The right of a riparian proprietor of land bordering upon a running stream to the benefit to be derived from the flow of its waters as a natural incident to, or one of the elements of, his estate, and that it cannot be lawfully diverted against his consent, is not denied, nor does the controversy relate to the just and reasonable use as between riparian proprietors. The question raised is whether Smith occupied the position of a riparian proprietor of a prior appropriator, as between himself and Sturr, when the latter undertook to locate his alleged water right. At that time Smith had been in possession for three years, and his homestead entry had been made over a year. * * *

By Section 17 of the Act of July 9, 1870, amendatory of the Act of July 26, 1866, it was provided, among other things, that 'all patents granted, or pre-emption or homesteads allowed, shall be subject to any *vested* and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as *may have been acquired* under or recognized by the ninth section of the Act of which this Act is amendatory.' 16 Stat. 218. And this was carried forward into section 2340 of the Revised Statutes, and *Smith's patent was subject to that reservation.*

The 9th section of the Act of 1866 is referred to by Mr. Justice Field in *Atchison v. Peterson*, 87 U. S. 20 Wall. 507, 512 (22: 414, 416), and in the opinion it is said that 'the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no

occasion for the application of the common-law doctrine of riparian proprietorship with respect to the waters of those streams.'

WHEN, HOWEVER, THE GOVERNMENT CEASES TO BE THE SOLE PROPRIETOR, THE RIGHT OF THE RIPARIAN OWNER ATTACHES, AND CANNOT BE SUBSEQUENTLY INVADED. As the riparian owner has the right to have the water flow *ut currere solebat*, undiminished except by reasonable consumption of upper proprietors, and no subsequent attempt to take the water only can override the prior appropriations of both land and water, it would seem reasonable that lawful riparian occupancy with intent to appropriate the land should have the same effect."

We come now to the Oregon case

Faull v. Cooke, 19 Or. 455-466, 26 Pac. 662. (July 1st, 1890).

Quotation from page 463:

"In *Larsen v. The O. R. & N. Co.*, decided at the present term, it was held, in effect, that a settlement made by a homestead claimant upon the public lands of the United States and compliance with act of congress on the subject, segregated the same from the public lands and cut off intervening claims, and such is the ruling of the land department of the United States.

Since the announcement of the opinion in *Larsen v. The O. R. & N. Co., supra*, this case was argued, and *our attention has been called to the recent opinion of the Supreme Court of the United States in Steers v. Beck*, 10 Fed. R. 350.

The opinion of the court in that case is very exhaustive, and fully and conclusively settles the legal question under consideration adversely to the appellant. In that case the identical question, in principal, involved here was presented, and it

was held that a *homestead claimant's riparian rights attached from the date of his settlement*, provided *he complied with the law* and obtained a patent for the land, and that when such patent was issued it related to the date of settlement *and cut off the right to divert a stream of water running through such homestead.*"

In

Baker v. Brown, 39 Ore. 66-75, 65 Pac. 799, 66 Pac. 193 (Decided July 15th, 1901)

the Supreme Court followed Faull v. Cooke, the Larsen case, Johnson v. Logan et al, and held:

"The right of a prior appropriation is limited to the use of the water by the pioneer settler BEFORE ANY ADVERSE CLAIMS OF RIPARIAN PROPRIETORS ATTACH TO THE STREAM FROM WHICH THE WATER IS TAKEN."

ADDITIONAL CASES SHOWING APPLICATION OF THE COMMON LAW RIPARIAN DOCTRINE IN THE OREGON SUPREME COURT IN DATES RANGING FROM 1899 TO 1912.

These cases show that a right by appropriation could not destroy a riparian right, except by adverse possession and use for the period of ten consecutive years.

Bowman v. Bowman, 35 Or. 279, 283 (57 Pac. 546);
Carson v. Hayes, 39 Or. 97 (65 Pac. 814);
Oregon Construction Company v. Allen Ditch Co., 41 Or. 209, 216 (69 Pac. 455, 93 Am. St. Rep. 701);
Britt v. Reed, 42 Or. 76, 83 (70 Pac. 1029, 1030);
Davis v. Chamberlain, 51 Or. 304 (98 Pac. 154);

Ison v. Sturgill, 57 Or. 109, 118 (109 Pac. 579, 110 Pac. 535);
Cantrall v. Sterling Min. Co., 61 Or. 516, 524, (122 Pac. 42)."

The dates upon which the foregoing decisions were rendered, range from the date of the Bowman case, in 35 Oregon, 1899, to that of the Cantrall v. Sterling Min. Co. case in 61 Oregon, 1912.

HOUGH V. PORTER

51 Or. 318-456 (95 Pac. 732, 98 Pac. 1083).

The only exception which we have noted is to be found in the celebrated case of Hough v. Porter, argued February 7, 1908, finally decided January 5, 1909, at the time of the session which passed the Water Code.

As the appellate court has practically held, the Desert Land Act is not subject to being construed as destroying riparian rights in lands in Oregon, patented subsequent to the enactment of the Desert Land Act, we are concerned only with syllabus paragraph 28, pages 404-5 of the 51st Oregon. The only point to Hough v. Porter is its *alleged destruction of vested rights in such lands*.

We follow with copy of the Desert Land Act:

THE DESERT LAND ACT

This is the Act of March 3rd, 1877, Title 43, United States Code Annotated, set forth in Sections 321, 322, 323 and 324.

"Section 321. Entry right generally; extent of

right to appropriate waters. It shall be lawful for any citizen of the United States, or any person of requisite age, 'who may be entitled to become a citizen, and who has filed his declaration to become such' and upon payment of 25 cents per acre —to file a declaration under oath with the register and the receiver* of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one-half section, by conducting water upon the same, within the period of three years thereafter; provided, however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated; and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, *shall remain and be held free* for the appropriation and use of the public for irrigation, mining and manufacturing purposes *subject to existing rights.* Said declaration shall describe particularly said one-half section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of $1 per acre for a tract of land not exceeding three hundred and twenty acres to any one person, a patent for the same shall be issued to him: Provided, That no person shall be permitted to enter more than one tract of land and not to exceed three hundred and twenty acres which shall be in compact form. (Mar. 3, 1877, c. 107, Sec. 1, 19 Stat. 377; Mar. 3, 1891, c. 561, Sec. 2, 26 Stat. 1096).

Section 322. Desert Lands defined; question how determined. All lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this chapter, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated.

The *determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office.* (Mar. 3, 1877, c. 107, Section 2, 3, 19 Stat. 377).

Section 323. States in which chapter applies. This chapter shall only apply to and take effect in the States of California, Colorado, Oregon, Nevada, Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and North and South Dakota. (March 3, 1877, c. 107, Sec. 3,* 19 Stat. 377; Mar. 3, 1891, c. 561, Sec. 2, 26 Stat. 1096).

Section 324. Assignment of entries. No assignment after March 28, 1908, of an entry made under this chapter shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry under this chapter of the land covered by the assigned entry, and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized. (Mar. 28, 1908, c. 112, Sec. 2, 35 Stat. 52).

DECISIONS SUBSEQUENT TO THE ENACTMENT OF THE WATER CODE

There were many decisions involving riparian rights.

We quote from:

In re Willow Creek, 74 Or. 593-655, (144 Pac. 505, 146 Pac. 475). *(1915)*

Quotation from Oregon Report, pages 626-7:

"22. In *Jones v. Conn*, 39 Or. 30 (64 Pac. 855, 65 Pac. 1068, 87 Am. St. Rep. 634, 54 L. R. A. 630), it was held in a controversy between riparian proprietors upon a natural watercourse, that a riparian proprietor has a right to the use and enjoyment of the water that naturally flows past or through his land, subject to the right of other riparian owners to a reasonable use thereof for domestic, agricultural and manufacturing purposes, provided that the upper proprietor does not appropriate enough to substantially injure the common right which each proproprietor has. * * *The doctrine of prior appropriation and riparian rights is not so antagonistic that they may not exist in the same locality.* A settler on a non-navigable stream has the election either to rely upon his rights as riparian proprietor or to make an appropriation of the water and claim as an appropriator, but he cannot do both: *Williams v. Altnow*, 51 Or. 277, 300 (95 Pac. 200, 97 Pac. 539); *Crawford v. Hathaway*, 60 Neb. 754 (84 N. W. 271); *Crawford v. Hathaway*, 61 Neb. 317 (85 N. W. 303); *Crawford v. Hathaway*, 67 Neb. 325 (93 N. W. 781, 108 Am. St. Rep. 647, 60 L. R. A. 889)."

Page 627:

"24. In the arid and semi-arid lands of the west the early home-builders first settled upon the streams and other bodies of water. The rights of such people to a reasonable use and benefit of the water flowing over their lands which they have appropriated or used for a beneficial purpose should be carefully considered and not abrogated. Those obtaining title to land take the same subject to the laws *then* prevailing and defining the appurtenances thereto. When *such rights have become vested*, they cannot be taken away by legislative enactment nor judicial decree. Like all

property they are subject to reasonable regulation."

Page 624:

"By act of Congress, July 26, 1866, Chapter 262, 14 Stat. 253 Section 9, (§2339, R. S. U. S., 7 Fed. Stats. Ann. 1090, 1093, U. S. Comp. Stats. 1913, § 4647), whenever rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued by priority of possession and are acknowledged by local customs, laws, and decisions of courts, the same are recognized and protected. This act established no new right. The practical construction of this statute has been that as long as the land belonged to the United States the water flowing over the same was subject to appropriation for any of the purposes named when such appropriation was recognized by the local customs, laws or decisions of the courts; *but if the water was not so appropriated, it was not subject to appropriation after the land over which it flowed became private property: Davis v. Chamberlain*, 51 Or. 304, 315 (98 Pac. 154); *Broder v. Water Co.* 101 U. S. 274, (25 L. Ed. 790); *Rio Grande Western R. R. Co. v. Telluride P. & T. Co.*, 16 Utah, 125, 137 (51 Pac. 146); *Benton v. Johncox*, 17 Wash. 277, 287 (49 Pac. 495, 61 Am. St. Rep. 912, 39 L. R. A. 107); *Sturr v. Beck*, 133 U. S. 541 (33 L. Ed. 761, 10 Sup. Ct. Rep. 850)."

We quote from the Norwood case:

NORWOOD CASE

Norwood v. Eastern Oregon Land Company, 112 Or. 106; *(227 Pac. 1111)*, (1924).

Quotation from page 111 of the Oregon report

"2. The riparian rights of the defendant company, as such, date back to the year 1867 *when it*

and its predecessors in title acquired the ownership of the land."

and from pages 113-4:

"According to the record, all that the company has ever had or claimed to hold is a riparian right. Such a right is appurtenant to the land. In *Jones v. Conn*, 39 Or. 30, 34 (64 Pac. 855, 65 Pac. 1068, 87 Am. St. Rep. 634, 54 L. R. A. 630, 53 Cent. L. J. 128), Mr. Chief Justice Robert S. Bean used the following language: 'It is often said that a riparian proprietor has a right, inseparably annexed to the soil, to have the water of a stream flow down to his land as it is wont to run, undiminished in quantity and unimpaired in quality.'

In *Brown v. Baker*, 39 Or. 66 (65 Pac. 799, 68 Pac. 193), Mr. Justice Moore said: 'The water of a non-navigable stream is an incident to the soil through which it flows.'

* * * Riparian rights are purely local, inseparably annexed to the lands washed by the stream at the *place where they border on its waters*. Such rights cannot be divorced from the adjacent lands."

and from page 116:

"We remember that, as determined by the decree of adjudication, the title to the defendant's land was acquired prior to the passage of the Desert Land Act of March 3, 1877, to which reference has been made. *The title of the defendant therefore carried with it the common-law riparian rights which have always been recognized in this state.*"

In the Norwood case, 112 Oregon, at 117, Mr. Justice Burnett, speaking for the court, said:

"The first section of that act says:

'Subject to existing rights, all waters within the state may be appropriated for beneficial use, as

herein provided, and not otherwise; but nothing herein contained shall be so construed as to take away or impair the vested right of any person, firm, corporation, or association to any water.'

Again, in Section 70 of that act it is said:

'Nothing in this act contained shall impair the vested right of any person, association or corporation to the use of water.'

The opening declaration of the act was that waters within the state may be appropriated for beneficial use. *The title of the act*, so far as existing rights were concerned, *limits the operation of the statute to 'the determination of existing rights.' Thus controlled in the title of the act as well as by the terms thereof, the legislature could not and did not add to or subtract from the scope of then existing rights.*"

OREGON LEGISLATIVE RECOGNITION OF RIPARIAN RIGHTS ARISING FROM THE LOCATION OF RIPARIAN LANDS ALONG THE STREAMS.

LAWS OF OREGON, 1891,

Page 52. Act approved February 18th, 1891.

An Act entitled: "An Act to provide for the appropiation of water from the lakes and running streams of the State of Oregon" * * * * *"allowing the condemnation of rights of riparian proprietors arising from their locations;"* * * * *.

"Sec. 8. Such corporation may also *maintain an action for the condemnation and appropriation of the right to the flow of water in any stream from which it proposes to divert water below the point of diversion vested in the owners of lands lying*

contiguous to such stream by virtue of their location. Such actions shall be brought in the county where the lands to be affected or some portion thereof are situated, and the manner of procedure therein shall be similar to that prescribed in the preceding section for condemnation of lands; *but no person owning lands lying contiguous to any stream shall, without his consent, be deprived of water for household or domestic use,* or for the purpose of watering his stock, or *of water necessary to* irrigate *crops growing upon such lands, and actually used therefor.*"

OREGON LAWS, 1895,

Page 13. Approved February 20, *1895.*

An Act. entitled: "An Act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property and for the distribution of water thereby for irrigation purposes, and for other and similar purposes."

Section 45 provides for a rotation system between users when the water is insufficent to fully supply the needs of all.

"Sec. 48. None of the provisions of this Act shall be construed as repealing or in anywise modifying the provisions of any Act relating to the subject of irrigation or water commissioners. *Nothing herein contained shall be deemed to authorize any person or persons to divert the waters of any river, creek, stream, canal or ditch from its channel, to the detriment of any person or persons having any interest in such river, creek, stream, canal or ditch or the waters therein, unless previous compensation be ascertained and paid therefor,* under the

laws of this state, authorizing the taking of private property for public uses."

OREGON LAWS OF 1899,

Page 172. Act approved February 18th, 1899.

(B. & C. Comp. 5022 et seq.)

An Act entitled: "To provide for the appropriation of water from the lakes and running streams of the State of Oregon for the purpose of developing the mineral resources of the state and for other purposes," * * * * * * "allowing the condemnation of rights of riparian proprietors arising from their location; * * *."

"Section 9. Such persons, companies and corporations may also maintain an action for the condemnation and appropriation of the right to the flow of water in any stream from which it proposes to divert water below the point of diversion vested in the owners of lands lying contiguous to such stream by virtue of their location. Such action shall be brought in the county where the . . . (The section is incomplete due to some error in its passage).

The foregoing Section 9 of the Act of February 18th, 1899, was amended in the Special Legislative Session of 1903. In the meantime it had been codified in the C. B. Bellinger and W. W. Cotton "Annotated Codes and Statutes of Oregon," Volume 2, and as Section 5030 thereof.

The amendment follows:

LAWS OF 1903, SPECIAL SESSION

Page 25. Filed with the Secretary of State, December 24, 1903.

Entitled: "An Act To Amend Section 5030 of the Laws of Oregon as compiled and annotated by C. B. Bellinger and W. W. Cotton."

As amended:

> "Sec. 5030. Such persons, companies and corporations may also maintain an action *for the condemnation and appropriation of the right to the flow of water in any stream from which it or they propose to divert water below the point of diversion vested in the owners of lands* LYING CONTIGUOUS TO SUCH STREAM BY VIRTUE OF THEIR LOCATION." * * * *

In January, 1905, the Supreme Court of Oregon considered the power of eminent domain clause in this Act, and said:

> "It would seem, however, as authority had been granted to condemn land for a ditch, and also power conferred to condemn the right to have the water of a stream flow in the channel thereof below the point of diversion, *the legislative assembly had not intended to deprive or even abridge the rights of a riparian proprietor.*"

It then added:

> "Condemnation proceedings are purely statutory, and every condition prerequisite to an exercise of the right must be strictly pursued."

Grande Ronde Electric Co. v. Drake, 46 Or. at page 248. (78 Pac. 1031).

OREGON LAWS of 1901,

Page 136. Act of February 25th, 1901.

An Act entitled: "An Act to amend Section 8 of an Act entitled 'An Act to provide for the appropriation of water from lakes and running streams of the State of Oregon" * * * *; "allowing the condemnation of lands for right of way; prescribing the manner of making appropriations and effecting condemnation of lands; *allowing the condemnation of rights of riparian proprietors arising from their location;* * * * * *."

> "§ 8. Such corporation may also maintain an action for the condemnation and appropriation of the right to the flow of water in any stream from which it proposes to divert water below the point of diversion vested in the owners of *lands lying contiguous to such stream by virtue of their location.* * * * * *."

OREGON LAWS OF 1905,

Chapter 45, Page 106. Approved February 9, 1905. Oregon Code 1930, § 37-302.

An Act entitled: "An act to provide for the condemnation of real property, water, water courses, and water and riparian rights by the State of Oregon for public use, for the manner of determining the necessity therefor, and the manner of procedure and making payment therefor."

Section 1. This section provides that whenever it is necessary for the state to acquire any real property, water, water courses, and water and riparian rights,

or any interest therein, it may bring, as provided therein, suit to condemn the same, and for assessment of damages.

This act is still in full force and effect, and it is to be found as above stated in Section 37-302, Oregon Code 1930.